

June 25, 2012

CLERK, U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT,
EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

In re

J. PEDRO ZARATE,

Debtor.

J. PEDRO ZARATE,

Plaintiff,

vs.

COUNTRYWIDE BANK, N.A., BANK OF
AMERICA, N.A. as successor-in-interest to
COUNTRYWIDE BANK, N.A., COUNTRY-
WIDE HOME LOANS SERVICING, LP.,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., AMERICAN MUTUAL
FINANCIAL SERVICES., RECONTRUST
COMPANY, N.A., BANK OF NEW YORK
MELLON fka THE BANK OF NEW YORK, AS
TRUSTEE FOR THE CERTIFICATE HOLDERS
OF THE CWALT, INC. ALTERNATIVE LOAN
TRUST 2006-OA10 MORTGAGE
PASS-TROUGH CERTIFICATES, SERIES
2006-OA10., and DOES 1through 100, inclusive,

Defendants.

Case No. 12-26252-13

D.C. No.:

Chapter 13 (Voluntary)

Adv. Pro. No: 12-02166

FIRST AMENDED
ADVERSARY PROCEEDING
COMPLAINT

DEMAND FOR JURY TRIAL

COMPLAINT

1. Plaintiff, J. Pedro Zarate ("Plaintiff"), hereby sets forth the following as its

Complaint against the above-named defendants as follows:

1 2. This is an action brought by the Debtor/Plaintiff (“Plaintiff”) for a Declaratory
2 Judgment, injunctive and equitable relief as provided for by Rules 3007, 7001(1). 7001(2),
3 7001(7), and 7001(9) of the Federal Rules of Bankruptcy Procedure (“Rules of Bankruptcy
4 Procedure”).

5 3. This is also an action to determine the secured status of the defendants herein
6 pursuant to Sections 105(a), 502(b)(1), 506 and 544(a) of the Bankruptcy Code and Rule
7 3007 of the Bankruptcy Rules.
8

9 4. The Plaintiff is also seeking the recovery of actual and punitive damages from
10 the Defendants pursuant to Sections 105(a) of Title 11 of the United States Code
11 commonly referred to as the Bankruptcy Abuse Prevention and Consumer Protection Act of
12 2005.
13

14 **I. JURISDICTION AND VENUE**

15 5. This Court has jurisdiction over the adversary proceeding pursuant to 28
16 U.S.C. §§ 1334 and 157(b)(2)(F)
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18 6. Venue of this adversary proceeding in this district is proper pursuant to 28
19 U.S.C. § 1409(a).

20 7. This is a “core” proceeding pursuant to 28 U.S.C. § 157(b).

21 8. This is an adversary proceeding brought under and pursuant to Rule 7001(1)
22 7001(2), 7001(7), and 7001(9)) of the Federal Rules of Bankruptcy Procedure and Sections 547
23 and 550 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy
24 Code”).
25

26 **II. PARTIES**

27 9. Plaintiff J. Pedro Zarate is an individual and debtor of the within a voluntary
28 petition for relief on March 30, 2011, under Chapter 13 of the Bankruptcy Code (the “Bankruptcy

Case”) in the Eastern District of California, Case No.12-26252-13

10. Defendants, and each of them, regularly engage in business in the State of California and regularly provide and/or implement mortgage loans and related services to residents in the State of California and the County of Sacramento.

11. Plaintiff bring this action against defendants for damages and harm resulting from defendants’ negligent, fraudulent, and unlawful conduct concerning a residential mortgage loan transactions with plaintiff. The residential mortgage concerned property (“Property) commonly known as 10826 Walmort Road, City of Wilton, County of Sacramento, California, is more particularly described as:

All that certain real property situate in the Unincorporated Area County of Sacramento, State of California, described as follows:

All that portion of Tract No. 91, as described in the partition of the Mokelumnes Rancho in the District Court of the sixth Judicial District of the State of California, in and for the County of Sacramento, entitled “John F. McCauley, plaintiff, vs. Oved Harvey, et al, defendants”, described as follows:

The North 20.00 feet acres of the West 50.00 acres of the East 80.00 acres of the Northeast one-quarter of Section 14. Township 6 North, Range 6 East. M.D.B. & M.
APN No. 134-0240-001-0000

12. Plaintiff J. Pedro Zarate is, and at all times relevant to this complaint was, an individual who reside in Sacramento County. Plaintiff refinanced the Property on February14, 2006 (“Closing Date”).

13. Plaintiff is informed and believe and on that basis allege that defendant Countrywide Bank, N.A.(“Countrywide Bank”) is, and at all times relevant to this complaint was, a diversified financial marketing and/or services corporation engaged primarily in residential banking and/or related businesses. Plaintiff is further informed and believe and on that basis allege

1 that Countrywide Bank has merged with defendant Bank of America (“B of A”) which has
2 succeeded to all of Countrywide’s rights and obligations regarding the loan and deed of trust that
3 is at issue in these proceedings. Countrywide Bank was the defendant who allegedly loaned the
4 money to Plaintiff Zarate for the refinance of the Property reserving to itself a Deed of Trust to
5 secure repayment of the loan. Plaintiff is further informed and believe that on the date the note and
6 deed of trust were executed, this defendant attempted to assigned its rights and obligations found
7 in the Deed of Trust to defendant Mortgage Electronic Registration Systems, Inc. (“MERS”) as its
8 alleged “nominee” who then, initially, retained Countrywide Bank to service the loan.
9

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11 14. Plaintiff is informed and believe and on that basis allege that defendant Bank of
12 America, N.A. (“B of A”) is, and at all times relevant to this complaint was, a diversified financial
13 marketing and/or services corporation engaged in residential banking and/or related businesses.
14 Plaintiff is further informed and believe and on that basis allege that defendant Bank of America
15 N.A. (“B of A”) is a successor to defendant Countrywide Bank., On July 1, 2008, Countrywide
16 Financial Corporation completed a merger with Red Oak Merger Corporation (“Red Oak”), a
17 wholly owned subsidiary of B of A that was created for the sole purpose of facilitating the
18 acquisition of Countrywide, pursuant to an Agreement and Plan of Merger, dated as of January 11,
19 2008, by and among Bank of America, Red Oak, and Countrywide Financial Corporation. The
20 acquisition was an all-stock transaction. B of A has assumed Countrywide and its subsidiaries’
21 liabilities, having paid to resolve other litigation arising from misconduct such as predatory lending
22 allegedly committed by Countrywide. At the time of Bank of America’s purchase of Countrywide,
23 a Bank of America spokesperson publicly stated: “We bought the company and all of its assets and
24 liabilities We are aware of the claims and potential claims against the company and have
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1 factored these into the purchase.” Bank of America is a successor-in-interest to the Countrywide
2 and is thus vicariously liable for the conduct of the Countrywide as alleged herein. which means
3 B of A has already factored expected litigation and futures loses with affected borrowers of
4 Countrywide.
5

6 15. Plaintiff is informed and believe and on that basis allege that Countrywide
7 Home Loans Servicing, LP (“Countrywide Loans”) is, and at all times relevant to this complaint
8 was, a diversified financial marketing and/or services limited partnership engaged primarily in
9 residential mortgage banking and/or related businesses. When the refinance loan at issue herein
10 was assigned as one of the mortgage loans that made up the Alternative Loan Trust 2006-OA10
11 Mortgage Pass-through Certificates, Series 2006-OA10, a trust (“the Trust”), this defendant was
12 named the “Master Servicer” of the Trust.
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15 16. Defendant Mortgage Electronic Registration Systems, Inc. (“MERS”) is a
16 private Delaware corporation that administers the MERS System, a national electronic registry
17 that tracks the transfer of ownership interest and servicing rights in mortgage loans. Through
18 the MERS System, MERS becomes the mortgagee of record for participating members through
19 assignment of the member’s interest to MERS. MERS is listed as the grantee in the official
20 records maintained at the county recorder’s office. The lender(s) retains the promissory notes,
21 as well as the servicing rights to the mortgages. The lender can then sell its interests to investors
22 without having to record the transaction in the public record. MERS is compensated for its
23 services through fees charged to participating MERS members. It was this defendant who
24 became defendant Countrywide’s “nominee” and nominated assignee/beneficiary named in the
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1 deed of trust at issue herein. It was this defendant who falsely claimed it was the beneficiary
2 under the deed of trust and unlawfully and wrongfully through the 'power' of the deed of trust
3 caused the foreclosure proceedings to be initiated. On the date of signing the closing
4 documents, February 14, 2006, and upon signing the Deed of Trust, Countrywide Bank
5 attempted to assigned its rights and obligations found in the Deed of Trust to defendant MERS
6 as its alleged "nominee". Plaintiff is informed and believe and on that basis allege that
7 MERS is not a party to and expressly has no beneficial interest in the Note, thereby severing the
8 beneficial interest under the Note and Deed of Trust.
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10
11 17. Plaintiff is informed and believe and on that basis allege that defendant
12 American Mutual Financial Services ("American Mutual") is, and at all times relevant to this
13 complaint was, a real estate brokerage corporation organized, existing, licensed and
14 authorized to do business under the laws of the State of California. It is this defendant who
15 brokered the refinance loan and unlawfully received \$17,850.00 from the lender as a 'yield
16 spread premium' kickback for directing the plaintiff into a loan package favoring the lender and
17 not the borrower Plaintiff Zarate.
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19 18. Plaintiff is informed and believe and on that basis allege that at all times
20 relevant to this complaint, defendant Recontrust Company N.A., successor in interest by merger
21 to Recontrust Company ("ReconTrust") was is a corporation organized and existing and
22 existing in the State of Nevada and authorized to do business under the laws of the State of
23 California. Plaintiff further alleges on information and belief that this defendant was named as
24 the actual trustee under the deed of trust securing the promissory note for the purpose of
25 expediting and conducting a non-judicial foreclosure sale of the Property.
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2 19. Plaintiff is informed and believe and on that basis allege that defendant the
3 Bank of New York Mellon ("Mellon") fka The Bank of New York, is and was the trustee of the
4 Trust, whereby, and pursuant to the pooling and servicing agreement, plaintiff's mortgage note,
5 along with thousands of other notes, was pooled into the Trust and 'securitized' with the
6 issuance of certificates issued for purchase by investors collateralized by the mortgage loans
7 that made up the Trust.
8

9 20. At all relevant times, each defendant knew or realized that the other defendants
10 were engaging in or planned to engage in the violations of law alleged in this complaint.
11 Knowing or realizing that other defendants were engaging in or planning to engage in unlawful
12 conduct, each defendant nevertheless facilitated the commission of those unlawful acts. Each
13 defendant intended to and did encourage, facilitate, or assist in the commission of the unlawful
14 acts, and thereby aided and abetted the other defendants in the unlawful conduct.
15

16 21. Plaintiff do not know the true names or capacities of defendants sued in this
17 complaint as Does 1 through 100, inclusive, and who are sued by such fictitious names.
18 Plaintiff will amend this complaint to allege said names and capacities when the information
19 has been ascertained. Plaintiff is informed and believe and on that basis allege that each of
20 the fictitiously named defendants is legally responsible in some manner for the acts or
21 omissions alleged and the injuries and damages claimed in this complaint, or who in some manner
22 claim an ownership, security, or other interest in the Property.
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24 22. Plaintiff is informed and believe and on that basis allege that at all times
25 relevant to this complaint, unless otherwise stated, each defendant, including those fictitiously
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1 named, was the agent, servant, employee, partner and/or joint venturer of each remaining
2 defendant, and was acting within the course and scope of such agency, employment,
3 partnership and/or joint venture with the permission and consent or ratification of each
4 remaining defendant, in doing the things alleged in this complaint.
5

6 **III. GENERAL ALLEGATIONS**

7 23. This action arises out of loan related activities on the Property of which the
8 plaintiff is the rightful owner. The plaintiff became lured and ensnared in a predatory refinance loan
9 of the kind addressed by the California Legislature when it enacted emergency anti-predatory
10 lending law to halt the economic down spiral caused by an influx of “preventable foreclosures”.
11

12 24. Plaintiff is informed and believe and on that basis allege that beginning in 1998,
13 lenders, their agents, employees, and related servicers, including the defendants herein, developed
14 a scheme to rapidly infuse capital into the home mortgage lending system by selling mortgages in
15 the secondary market, normally three to five times, to create a bankruptcy remote transaction. The
16 lenders, their agents, employees, and related servicers, including defendants herein, then pooled
17 these mortgages into large trusts, securitizing the pool and selling these securities on Wall Street
18 as mortgage backed securities, bonds, derivatives and insurances, often for twenty to thirty times
19 the original mortgage. This deceptive scheme had one primary goal – to supply the secondary
20 market with as many loans as possible, ideally loans that would earn the highest premiums.
21

22 25. In the typical securitization transaction involving mortgage-backed securities,
23 loans were “pooled” together and transferred to a trust controlled by the securitizer. The trust then
24 created and sold securities backed by the loans in the pool. Holders of the securities received the
25 right to a portion of the monthly payment stream from the pooled loans, although they were not
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1 typically entitled to the entire payment stream. Rather, the holders received some portion of the
2 monthly payments. The securitizer or the trust it controlled often retained an interest in any
3 remaining payment streams not sold to security holders. These securitizations could involve the
4 pooling of hundreds or thousands of loans, and the sale of many thousands of shares.

5
6 26. The price paid by purchasers of securities or pools of whole loans varied based
7 on the demand for the particular types of loans included in the securitization or sale of whole loans.
8 The characteristics of the loans, such as whether the loans are prime or subprime, whether the loans
9 had an adjustable or fixed interest rate, or whether the loans include a prepayment penalty, all
10 influenced the price. (Please see Paragraphs 33 through 38, below.)
11

12 27. Various types of loans and loan terms earned greater prices, or “premiums,” in
13 the secondary market. For example, investors in mortgages and mortgage backed securities have
14 been willing to pay higher premiums for loans with prepayment penalties. Because the prepayment
15 penalty deters borrowers from refinancing early in the life of the loan, it essentially ensures that the
16 income stream from the loan will continue while the prepayment penalty is in effect. Lenders,
17 typically sought to market loans that earned it higher premiums, including loans with prepayment
18 penalties.
19

20 28. Defendant lenders generally originated as many loans as possible not only to
21 maximize its profits on the secondary market, but to earn greater profits from servicing the
22 mortgages it sold. Lenders often retained the right to service the loans it securitized and sold as
23 pools of whole loans. The terms of the securitizations and sales agreements for pools of whole
24 loans authorized lenders to charge the purchasers a monthly fee for servicing the loans, typically
25 a percentage of the payment stream on the loan.
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1 29. Driven by the push for a greater market share, lenders did whatever it took to
2 sell more loans, faster – including by easing its underwriting criteria and disregarding the minimal
3 underwriting criteria it claimed to require. **By easing and disregarding its underwriting criteria,**
4 **lenders also admitted the fraudulent increased in property values promoted by this actions,**
5 **and all together lenders increased the risk that borrowers would lose their homes.** And
6 **hundreds of lawsuits are been demanding from this lenders damages for this fraudulent**
7 **committed actions. The SEC (Securities and Exchange Commission) reports that**
8 **Countrywide was deliberately misleading investors about significant credit risk, and SEC had**
9 **to enforce actions addressing misconduct that led or arose to Financial Crises by penalizing**
10 **countrywide misconduct actions for millions of dollars settlement in penalties, And SEC has**
11 **a list of lenders and keeps on punishing this Lenders for misconduct. One of SEC sites is,**
12 **<http://www.sec.gov/spotlight/enf-actions-fc.shtml>**

15 30. Traditionally, lenders and brokers enticed the consumer through advertising the
16 idea of consumer property loan products by use of mail, radio advertising, or in local
17 newspapers, even though the consumer was not in the need of a loan. If the consumer was
18 persuaded to take out a loan, the lender, under normal circumstances would require a borrower
19 accepting the mortgage loan to document his or her income(s), for example, by providing W-2s
20 or tax returns, as well as their assets. In the instant case the lender disregarded such documentation
21 requirements with respect to its riskiest loan products and introduced a variety
22 of reduced or no documentation loan programs to these plaintiff that eased and quickened the
23 loan origination process. The adjustable rate mortgage (ARM) requirements were reduced or
24 no documentation loan was given to plaintiff Zarate.

1 31. In this case, the plaintiff Zarate's, income was inflated and assets were stated
2 but not verified. Employment was verbally confirmed and income was supposed to be roughly
3 consistent with incomes earned in the type of job in which the borrower was employed.
4 Reduced documentation loans, in turn, allowed these borrowers to document their incomes
5 through the provision of information that was less reliable than the information required of
6 documentation loans, such as bank statements or verbal verification of employment.

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8 32. With the assistance of the lender, it became standard practice for loan processors
9 and underwriters to check www.salary.com to see if a stated income was within a reasonable
10 range, with more tolerance on the upside for California salaries. Because loan officers knew
11 about this practice, they too would look at salary.com to figure out the parameters ahead of time and
12 know by how much they could overstate (or fabricate) income.

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14 33. Loans based on stated income also encouraged the overstating of income – loan
15 brokers and officers either overstated the borrower's income without his or her knowledge. It
16 became standard practice for loan processors and underwriters to check www.salary.com to see
17 if a stated income was within a reasonable range, with more tolerance on the upside for
18 California salaries. Because loan officers knew about this practice, they too would look at
19 salary.com to figure out the parameters ahead of time and know by how much they could
20 overstate (or fabricate) income. **In the instant case, a representative of the lender, defendant**
21 **Countrywide Bank, and loan broker, defendant American Mutual, without plaintiff Zarate's**
22 **knowledge, falsely indicated on the loan application that the plaintiff Zarate's monthly**
23 **income was \$18,000.00 per month even though Plaintiff Zarate stated to this representative**
24 **filling in the form that his actual income was only \$5,400.00.**
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1 34. Further, in California, a mortgage broker owes his or her client a fiduciary duty.
2 A mortgage broker is customarily retained by a borrower to act as the borrower's agent in
3 negotiating an acceptable loan. All persons engaged in this business in California are required
4 to obtain real estate licenses and to comply with statutory requirements. Among other things,
5 the mortgage broker has an obligation to make a full and accurate disclosure of the terms of a
6 loan to borrowers, particularly those that might affect the borrower's decision, and to act
7 always in the utmost good faith toward the borrower and to refrain from obtaining any
8 advantage over the borrower. **In this case the refinance ARM loan was brokered by defendant**
9 **American Mutual.**
10

11 35. Lenders typically paid brokers compensation in the form of yield spread premiums
12 or rebates to induce brokers to place borrowers in loans that would earn the lender the greatest
13 profit on the secondary market, regardless of whether the loans were in the best interest of, or
14 appropriate for, the borrowers. In fact, the mortgages that earned lenders the highest profit, earned
15 the brokers the highest rebates or yield spread premiums. The broker earned up to six points (i.e.,
16 six percent of the amount of the loan), whether in origination fees, rebates, or yield spread
17 premiums. This high level of compensation was well in excess of the industry norm and
18 encouraged brokers to sell the loans without regard to whether the loans were in their clients' best
19 interest.
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23 36. Borrowers generally did not realize that their loans contained terms that were
24 unfavorable to them and provided greater compensation to their brokers specifically as payment
25 for those unfavorable terms. An origination fee or other charges imposed by a broker are either
26 paid by the borrower or financed as part of the loan. In contrast, rebates and yield spread
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1 premiums are not part of the principal of the loan and instead are paid separately by the lender
2 to the broker. Final Settlement Statements provided to the borrower at close of escrow might
3 indicate, at most, that a yield spread premium or rebate was paid outside of closing (often
4 delineated as “p.o.c.” or “ysp poc”), with no indication that the payment constituted
5 compensation from the lender to the broker for placing the borrower in a loan with terms that
6 were not in the borrower’s best interest, such as a higher interest rate or lengthier prepayment
7 penalty. **In this case defendant lender, Countrywide Bank, paid a kickback ‘yield spread**
8 **premium’ fee in the amount of \$17,850.00 to defendant broker, American Mutual, for**
9 **directing and steering plaintiff Zarate into the loan that was in the best financial interest of**
10 **defendant Countrywide Bank and not in the financial interest of plaintiff Zarate.**

13 **IV. SPECIFIC FACTS**

14 37. On or about January 2006, being profit-motivated, defendant bank Countrywide
15 and defendant real estate broker American Mutual, wished to issue as many loans as possible. This
16 was because of the huge profits to be realized by the bank from the sale of the issued loan(s) in the
17 secondary banking market, and profits to be realized by the real estate broker in the form of
18 kickback fees from the bank. Plaintiff Zarate is informed and believes and thereon alleges that in
19 this refinance transaction, Countrywide had assigned to defendant American Mutual to promote the
20 issuance of the real estate loan. It was in this pressurized atmosphere that defendant American
21 Mutual “sold” and convinced plaintiff Zarate to agree to the predatory and draconian \$595,000.00
22 adjustable rate refinance loan (ARM), secured by a first deed of trust. And, as alleged and described
23 below, it was in this fast and loose atmosphere of quick and easy money that the illegal and
24 fraudulent acts were committed against plaintiff Zarate.

1 38. During the loan transactions, as herein described, the loan broker American
2 Mutual's employee and plaintiff Zarate maintained close communications, and a legal fiduciary
3 relationship existed between the plaintiff Zarate and American Mutual through its agent. It was
4 the agent who filled out the application for the loan and who, without plaintiff Zarate's
5 knowledge, fraudulently indicated on the loan an inflated income amount. When asked by
6 American Mutual's agent what plaintiff Zarate's income was, instead of writing in the
7 application the true amount of \$5,400.00, as disclosed by the plaintiff Zarate, the agent wrote in
8 the inflated false amount of \$18,000.00, in an apparent attempt to qualify plaintiff Zarate for
9 the loan. At the time of closing of escrow, the loan documents, including the Fannie Mae 1003
10 Application, were laid in a stack before plaintiff Zarate for signature. Plaintiff Zarate did not
11 read the documents and depended on American Mutual or any of its employees to disclose any
12 information not already discussed. Nothing was disclosed. As far as plaintiff Zarate could
13 determine, everything seemed in order. The documents were signed, the money was transferred,
14 the escrow closed, and plaintiff took possession of the property.

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16 39. Eventually, defendant MERS, who, at that time, was defendant Countrywide's
17 "nominee" and purported "beneficiary" under the deed of trust, attempted to cause a Notice of
18 Default to be filed with the Sacramento County Recorder's Office and served on plaintiff Zarate
19 Much later, MERS "assigned" its alleged "beneficial interest", if any it had, in the Deed of
20 Trust to a purchaser in the secondary banking market as part of the securitization process and
21 was further assigned and sold to other parties also involved in the securitization process. The
22 assignment trail eventually ended with the Note and Deed of Trust becoming one of thousands
23 of Notes and Deeds of Trust in the pooling trust (the Trust) for which defendant Mellon is the
24 Trustee. Defendant Mellon, under the last purported "assignment" has filed the Notice of Sale
25 with the Sacramento County Recorder's Office and had it served on plaintiff Zarate.

26
27 40. Plaintiff s are informed and believe that the Notice of Default and the Notice of
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1 Sale foreclosure should be declared null and void or voidable as the procedural requirements of
2 California Civil Code Section 2924, *et seq.*, were violated.

3 41. Defendant MERS had no standing to initiate the foreclosure proceeding, and it was
4 not a party in interest with the power and right to initiate the foreclosure proceedings with the
5 filing of the Notice of Default and its serving on plaintiff Zarate. Further, because it was not a
6 party in interest with standing any such "assignment" as the beneficiary to the Deed of Trust to
7 a third party is also null and void without effect.

8 42. Defendant MERS purports to be a registry such as the Department of Motor
9 Vehicles. MERS allegedly assigns mortgages MIN numbers (mortgage identification numbers),
10 just as the DMV keeps track of VIN numbers (vehicle identification numbers). Neither MERS
11 nor the DMV own the mortgages nor the vehicles and neither have any beneficial interests in
12 these mortgages or vehicles, as was stated by R.K. Arnold, President and CEO of MERSCORP,
13 Inc. on November 16, 2010 before the Senate Committee on Banking, Housing and Urban
14 Affairs.

15 43. There has been no cognizable chain of title assignments to the DOT for the
16 Wilton property recorded in the Sacramento County Recorder's Office.

17 44. A longstanding and unchanged bedrock principle in American
18 jurisprudence holds that a mortgagee has no rights under the mortgage unless it legally
19 attaches to the Promissory Note for which it acts as a security instrument. Carpenter v.
20 Longan, 83 U.S. 271, 274 (1872) ("the note and mortgage are inseparable..., the
21 assignment of the note carries the mortgage with it, while an assignment of the latter
22 alone is a nullity.") Plaintiff further alleges that to date, every state Supreme Court that
23 has looked into the issue of whether MERS is a mortgagee has concluded that MERS is
24 not a mortgagee or a deed of trust beneficiary and is a stranger to the Pooling and Servicing
25 Agreement .
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V. THE SECURITIZED TRUST AND POOLING AGREEMENT

45. The Alternative Loan Trust 2006-OA10 Mortgage Pass-through Certificates, Series 2006-OA10 ("the Trust") is a common law trust formed on or about June 1, 2006, pursuant to New York law. The corpus of the Trust purportedly consists of a pool of mortgage loans whose value is approximately two and three quarter billion dollars (\$2,782,512,672,.00). As is described in the 'Free Writing Prospectus' filed with the Security Exchange Commission, the Trust is comprised of thousands mortgage loans consisting of 30- and 40-year conventional, adjustable rate, negative amortization mortgage loans secured by first liens on one-to-four family residential properties. Plaintiff is informed and believe and thereon allege that the Trust has no officers or directors and no continuing duties other than to hold assets and to issue the series of certificates of investment as described in the Free Writing Prospectus.

46. The Pooling and Servicing Agreement ("PSA") dated June 1, 2006, is a public legal document entered into between certain parties to create the Trust. It is filed with the Securities and Exchange Commission and it serves to create and to limit the powers and duties of the Trust and the Trustee. The Pooling and Servicing Agreement provides for a double purchase and sale whereby a 'Seller' (Countrywide Home Loans, Inc. was one of four 'Sellers') sells certain mortgage loans to a 'Depositor' ('CWALT, Inc.') which, in turn, sells the mortgage loans to the Trust (defendant Mellon as Trustee). The transactions are designed to be "True Sales" to comply with Internal Revenue Code requirements for a Real Estate Mortgage Investment Conduit, or "REMIC," and to be bankruptcy remote from any claims of the originators of the said loans. The Pooling and Servicing Agreement (the "PSA") also establishes the terms and conditions for servicing the mortgage-backed notes to be held in the trust pool.

47. Plaintiff is informed and believe and thereon allege that, generally, under the terms of said PSA, all assets of the Trust must be conveyed to the Trust on or before a fixed date of, (the "Cut-Off Date"), or said assets will not be deemed property or assets of the Trust.

48. Under Section 2.01 (Conveyance of Mortgage) of the Pooling and Servicing Agreement, as of the Cut-Off Date of June 1, 2006, the Depositor allegedly conveyed to the Trustee before the Closing date of June 30, 2006 and had a duty to do so, including both with the transfer the assignment of each original Note and of each Deed of Trust.

49. The Agreement contains a reference to an attached schedule to the PSA, by which each individual mortgage loan in the pool is identified by address and other characteristics, but no such schedule is attached to the document filed with the SEC, and there is no indication in the Pooling and Servicing Agreement of a Deed of Trust against the Wilton property located in Sacramento County held by the Trust.

50. The PSA names the following parties that, with the exception of the Master Servicer, supposedly acquired legal ownership and possession of the Promissory Note and Deed of Trust. They include:

- A. The "Originator"— Countrywide Bank, N.A.;
- B. The "Sponsor and Seller" - Countrywide Home Loans, Inc.;
- C. The "Depositor" – CWALT, Inc.
- D. The "Master Servicer" - Countrywide Home Loans Servicing LP; and
- E. The "Trustee" - Bank of New York.

51. Section 2.01(c) and 2.01(c)(i) (A) of the PSA state:

(b)

“(c) In connection with the transfer and assignment set forth in clause (b) above, the Depositor has delivered or caused to be delivered to the Trustee (or, in the case of the Delay Delivery Mortgage Loans, will deliver or cause to be delivered to the Trustee within thirty (30) days following the Closing Date) for the benefit of the Certificateholders the following documents or instruments with respect to each Mortgage Loan so assigned:

(i)

(A) the original Mortgage Note endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of

_____ without recourse," with all intervening endorsements showing a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each such endorsement being sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note); . . ."

52. Plaintiff is informed and believe and thereon allege that neither in the aforementioned documents nor in the Sacramento County Recorder's Office does there appear any assignment endorsements or allonges recorded whatsoever by and between the parties/ assignees to the PSA showing a complete chain of endorsement of the Mortgage Note. There has been no cognizable chain of title assignments to the Deed of Trust for the Wilton property recorded in the Sacramento County Recorder's Office.

53. Plaintiff allege that no defendant in the herein adversary proceeding has or had either constitutional or prudential standing to foreclose on the Wilton property. as there was no executed assignment into the Trust from any named defendant.

54. Further, Section 3.11 of PSA states that it is the obligation of the Master Servicer to initiate and conduct the foreclosure proceedings, and not the Trustee.

55. Plaintiff allege that defendant Mellon, the Trustee of the PSA in the herein has or had neither constitutional or prudential standing to foreclose on the Wilton property.

56. The following claims for relief are asserted against the defendants herein without prejudice to any rights the plaintiff may have, or which this Court may grant to the plaintiff, to assert additional causes of action or allegations based on facts disclosed in documents or other information made available to the plaintiff in the future or developed as a result of discovery or otherwise.

FIRST CLAIM FOR RELIEF
(Fraud As to Defendant American Mutual, Defendant
Countrywide Bank, and Defendant B of A)

57. Plaintiff Zarate incorporates by reference Paragraphs 1 through 56 as though

1 fully set forth herein.

2 58. On or about end of 2005, and beginning of 2006, the plaintiff was offered to
3 obtain refinancing on this subject property, by an agent of Countrywide and American Mutual
4 Sukhdev Tumber. In order to refinance the Property and Secured by a first deed of trust, the loan
5 was obtained from defendant Countrywide Bank. To determine whether the plaintiff could qualify
6 for this loan, the defendant broker was required to fill out and complete a Fannie Mae Form 1003
7 application form entitled "Uniform Residential Loan Application" disclosing the plaintiff's assets,
8 income, and expenses. In filling out this form, the application instructs that the form should be
9 completed with the help of the lender, and because defendant American Mutual helped fill out this
10 application, it was acting as an agent of defendant Countrywide. An agent, and employee of
11 defendant American Mutual, Sukhdev Tumber, interviewed the defendant and completed the
12 application. Plaintiff is informed and believes and thereon alleges that American Mutual, in concert
13 with Countrywide Bank, was instructed and directed by Countrywide Bank to help the plaintiff
14 complete the form and thereby acted as an agent of Countrywide Bank within the course and scope
15 of such agency.

16 59. Plaintiff is informed and believes, and, upon such information and belief, alleges
17 that defendant American Mutual, while acting as plaintiff's fiduciary mortgage broker, also acted
18 as the agent and fiduciary of defendant Countrywide Bank. This belief is based on two (2)
19 considerations: (1) the 1003 Fannie Mae Form 1003 loan application states that the application is
20 to be filled out with the aid of the lender, and it was an employee of defendant Power who actually
21 filled out the form, and (2) plaintiff is informed and believes that in addition to the broker fee
22 earned by American Mutual and paid from the loan funds, Countrywide Bank paid a 'yield spread
23 premium' to American Mutual as a kick back reward fee for 'steering' the plaintiff into a more
24 expensive loan, a loan with terms that more favored the lender's interests rather than the
25 borrower's interests. This fee was paid from funds outside of the loan.

26 60. The plaintiff truthfully answered the questions including the question(s) that
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1 required the defendant to disclose his monthly income. The plaintiff disclosed to the agent that his
2 gross income for 2005 was approximately \$65,000.00 or about \$5,400.00 per month.

3 61. Plaintiff is informed and believes and thereon alleges that his gross income
4 would not qualify him to obtain the loan required for the refinance of the Property. Plaintiff is
5 further informed and believes that the agent knew this. Nevertheless, instead of inscribing
6 \$5,400.00 as the plaintiff's income, the application states that
7 the plaintiff's monthly income was \$18,000.00, thus qualifying the plaintiff for the loan
8 necessary for the refinance of the Property. This representative further represented to the
9 plaintiff that he could afford the loan, and his income would qualify him for the loan.

10 62. These representations made by the agent and employee of the loan broker,
11 defendant American Mutual, that the plaintiff's stated income was \$18,000.00, that the
12 plaintiff could afford the loan, and that his income would qualify him for the loan were in fact
13 false. The true fact was that at all times relevant to this complaint, plaintiff's maximum
14 monthly incomes did not exceed about \$5,400.00 which did not qualify the plaintiff for the
15 loan of \$595,000.00. Further, even if the loan had been granted based on plaintiff's actual
16 income, the plaintiff, nevertheless, could not afford the loan.

17 63. Therefore defendant lender Countrywide Bank pursuant to the doctrine of
18 *respondeat superior*, was liable for the fraudulent statements made by the employee of defendant
19 mortgage broker, American Mutual.

20 64. When these defendants, through defendant American Mutual's employee made
21 these representations, they knew them to be false, and these representations were made with the
22 intent to defraud and deceive plaintiff and with the intent to induce plaintiff to take out the loan
23 that, if the truth were known, he could not afford.

24 65. In reliance on the representations of the employee of American Mutual, the
25 plaintiff entered into the loan agreement for the refinance of the Property with the belief that he
26 could afford the loan and that his income would qualify him for the loan.
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68. As shown in the facts pleaded hereinabove, this defendant's conduct was intended to cause injury to plaintiff or was despicable conduct carried on by this defendant resulting in a cruel and unjust hardship in conscious disregard of plaintiff's rights, and was conducted with the intention to deprive plaintiff of property, legal rights, or otherwise cause injury, such as to constitute malice under California Civil Code §3294. Defendant American Mutual's acts were done knowingly, willfully, and with malicious intent with a conscious reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to cruel and unjust hardship in conscious disregard of his rights, such that plaintiff is entitled to punitive damages appropriate to punish or set an example of this defendant in the amount of \$850,000.00.

21 69. Plaintiff Zarate incorporates by reference Paragraphs 1 through 68 as though fully set forth herein.

26 1. The material fact that the loan was issued by the lender with the
27 foreknowledge and understanding that because the lender's credit status

1 was not reasonably sufficient to support the loan, it was probable that in
2 the future the loan would be foreclosed upon;

- 3 2. The material fact that the separation of the Deed of Trust from the
4 Promissory Note by retention of the Promissory Note by the lender and
5 the separate "assignment" to MERS as the purported "nominee" and
6 "beneficiary" was an unlawful act with no force and effect;
- 7 3. The material fact that any act by defendant MERS as beneficiary to the
8 Deed of Trust in furtherance of a non-judicial foreclosure sale was null
9 and void;
- 10 4. The material fact that the monthly payments to be made by the plaintiff
11 and required by the Promissory Note could not be enforced by the alleged
12 "nominee" and "beneficiary", defendant MERS;
- 13 5. The material fact that these named defendants in the issuance of the loan
14 acted in coordination with each other in furtherance of a scheme and
15 agreement to issue loans to persons who reasonably did not have
16 appropriate credit and should not have qualified for property loans of
17 which the plaintiff was one;
- 18 6. The material fact that the issued Promissory Note would be included as
19 one of thousands of other like Notes as part of a fraudulent PSA Trust
20 securitization for its fraudulent sale on Wall Street to investors

21 71. Defendant lender Countrywide Bank (and B of A as its successor in interest),
22 pursuant to the doctrine of *respondeat superior*, is liable for the failure of the defendant broker,
23 American Mutual, to disclose the above material facts.

24 72. Defendant American Mutual's failure to disclose these material facts, was
25 accomplished with the intent to defraud the plaintiff.

26 73. Plaintiff was not aware and had no knowledge of the material facts not disclosed.
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1 In reliance on the representations, the forthrightness, and the truthfulness of American Mutual,
2 plaintiff's fiduciary in this transaction, the plaintiff entered into the loan agreement for the
3 refinance of the Property with the belief that he could afford the loan, that his income would
4 qualify him for the loan, and he further entered this agreement without knowledge of the existence
5 of the above-listed facts.

6 74. As a result of these defendant's fraudulent failure to disclose the above-listed
7 material facts, plaintiff has been required to incur damages including, but not limited to,
8 diminution of the Property's value, attorneys' fees, costs, interest and other damages incurred in
9 plaintiff's defense to protect his ownership and possessory interests in the Property against the
10 unlawful foreclosure activities of defendants, and each of them, in the amount of \$180,000.00.

11 75. As a further proximate result of defendant's violation and breach of its general
12 duties and obligations owed to plaintiff and the consequences proximately caused by the
13 defendants' failure to disclose material facts, as herein above alleged, plaintiff has suffered severe
14 humiliation, mental anguish, and emotional and physical distress, and has been injured in mind and
15 body in the sum of \$760,000.00.

16 76. As shown in the facts pleaded hereinabove, this defendant's conduct was intended
17 to cause injury to plaintiff or was despicable conduct carried on by this defendant resulting in a
18 cruel and unjust hardship in conscious disregard of plaintiff's rights, and was conducted with the
19 intention to deprive plaintiff of property, legal rights, or otherwise cause injury, such as to
20 constitute malice under California Civil Code §3294. Defendant American Mutual's acts were done
21 knowingly, willfully, and with malicious intent with a conscious reckless disregard of the rights
22 of plaintiff; conduct that subjected plaintiff to cruel and unjust hardship in conscious disregard of
23 his rights, such that plaintiff is entitled to punitive damages appropriate to punish or set an
24 example of this defendant in the amount of \$850,000.00.
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THIRD CLAIM FOR RELIEF
(Breach of Fiduciary Duty as to Defendant American
Mutual, Defendant Countrywide Bank, and Defendant B of A)

77. Plaintiff Zarate incorporates by reference Paragraphs 1 through 76 as though fully set forth herein.

78. Plaintiff retained defendant American Mutual to act as the mortgage broker. Upon American Mutual's retention as a mortgage broker, a fiduciary relationship was created between American Mutual and plaintiff. As plaintiff's fiduciary, defendant American Mutual owed plaintiff the fiduciary duties of loyalty, diligence, trust, confidence, disclosure, and due care with the affirmative duty to refrain from self-dealing and to act in the best interest of the plaintiff against all other competing interests.

79. Plaintiff is informed and believes, and upon such information and belief and in doing the things described herein, alleges that defendant American Mutual, while acting as plaintiff's fiduciary mortgage broker, also acted as the agent of defendant Countrywide Bank. This belief is based on two (2) considerations: (1) the 1003 Fannie Mae Form 1003 loan application states that the application for the refinance loan is to be filled out with the aid of the lender, and it was an employee of defendant American Mutual who actually filled out the form, and (2) upon information and belief, in addition to the broker fee earned by American Mutual and paid by the loan funds, Countrywide Bank separately paid \$ 17,850.00 as 'yield spread premium' to American Mutual as a kick back reward fee for 'steering' the plaintiff into a more expensive loan, a loan with terms that more favored the lender's interests rather than the borrowers' interests. Acting as the principal to the defendant American Mutual, the agent, defendant Countrywide Bank is vicariously charged with the liability imposed on American Mutual because, as described below, American Mutual's acts in breach of its fiduciary duties owed plaintiff were conducted within the course and scope of the agency relationship then existing between defendant American Mutual and defendant Countrywide Bank.

80. As described in plaintiff's First Claim for Relief, above, defendant American

1 Mutual breached the fiduciary obligation owed plaintiff when its agent: (1) falsely and fraudulently
2 stated on the loan application that plaintiff's income was \$18,000.00 when the truthful income
3 amount was only \$5,400.00, and (2) fraudulently expressed to the plaintiff that he could afford the
4 refinance loan and that his actual income qualified him for the loan.

5 81. As a result of the defendant's American Mutual's breach of the fiduciary duties
6 owed to plaintiff, as herein described, plaintiff has been required to incur actual damages
7 including, but not limited to, diminution of the Property's value, attorneys' fees, costs, interest
8 and other damages incurred in plaintiff's defense to protect his ownership and possessory
9 interests in the Property against the unlawful foreclosure activities of defendants, and each of
10 them, in the amount of \$180,000.00.

11 82 As a further proximate result of the defendant's American Mutual's breach of its
12 fiduciary duties owed to plaintiff as herein described, , as herein above alleged, plaintiff has
13 suffered severe humiliation, mental anguish, and emotional and physical distress, and has been
14 injured in mind and body in the sum of \$760,000.00.

15 83 As shown in the facts pleaded hereinabove, American Mutual's conduct was
16 intended to cause injury to plaintiff or was despicable conduct carried on by this defendant
17 resulting in a cruel and unjust hardship in conscious disregard of plaintiff's rights, and was
18 conducted with the intention to deprive plaintiff of property, legal rights, or otherwise cause
19 injury, such as to constitute malice under California Civil Code §3294. Defendant American
20 Mutual's acts were done knowingly, willfully, and with malicious intent with a conscious
21 reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to cruel and unjust
22 hardship in conscious disregard of his rights, such that plaintiff is entitled to punitive damages
23 appropriate to punish or set an example of this defendant in the amount of \$850,000.00.
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FOURTH CLAIM FOR RELIEF
(Breach of Fiduciary Duty as to Defendant American
Mutual, Defendant Countrywide, and Defendant B of A)

84. Plaintiff Zarate incorporates by reference Paragraphs 1 through 83 as though fully set forth herein.

85. Plaintiff retained defendant American Mutual to act as the mortgage broker. Upon American Mutual's retention as a mortgage broker, a fiduciary relationship was created between American Mutual and plaintiff whereby as plaintiff's fiduciary, defendant American Mutual owed plaintiff the fiduciary duties of loyalty, diligence, trust, confidence, and due care with the affirmative duty to refrain from self-dealing and to act in the best interest of the plaintiff against all other competing interests.

86. Plaintiff is informed and believes, and upon such information and belief, and in doing the things described herein, alleges that defendant American Mutual, while acting as plaintiff's fiduciary mortgage broker, also acted as the agent of defendant Countrywide Bank. This belief is based on two (2) considerations: (1) the 1003 Fannie Mae Form 1003 loan application states that the application for the purchase money loan is to be filled out with the aid of the lender, and it an employee of defendant American Mutual who actually filled out the form, and (2) in addition to the broker fee earned by American Mutual and paid by the loan funds, Countrywide Bank separately paid a 'yield spread premium' of \$17,850.00 to American Mutual as a kick back reward fee for 'steering' the plaintiff into a more expensive loan, a loan with terms that more favored the lender's interests rather than the borrower's interests. Acting as the principal to the defendant American Mutual, the agent, defendant Countrywide Bank, is vicariously charged with the liability imposed on American Mutual because, as described below, American Mutual's acts in breach of its fiduciary duties owed plaintiff were conducted within the course and scope of the agency relationship then existing between defendant American Mutual and defendant Countrywide Bank.

87. Defendant American Mutual breached the fiduciary duties owed to plaintiff

1 when in its capacity as plaintiff's mortgage broker, it steered, counseled, and directed plaintiff to
2 accept the \$595,000.00 loan product from defendant Countrywide Bank that was more costly and
3 expensive to the plaintiff than other loan products that were available to them. But because this
4 loan product was in defendant American Mutual's financial interests, as well as defendant
5 Countrywide Bank's financial interests, defendant Countrywide Bank paid to defendant American
6 Mutual a 'yield spread premium' kickback fee of \$17,850.00 as a reward for defendant American
7 Mutual's efforts at steering plaintiff into the more expensive loan. These actions in steering the
8 plaintiff into the more expensive loan and the receipt of the \$17,850.00 were in violation of the
9 fiduciary duties of loyalty, diligence, trust, confidence, and due care owed to plaintiff, and each
10 of them, and, in particular, the affirmative duty to refrain from self-dealing and to act in the best
11 interest of the plaintiff against all other competing interests including its own.

12 88. Eventually, as a result of the of the actions of defendant American Mutual, as
13 described in this Claim for Relief, the more expensive purchase money loan was issued
14 which later led the beneficiary of the Deed of Trust securing the Promissory Note to initiate non-
15 judicial foreclosure proceedings.

16 89. As a result of the defendant's American Mutual's breach of the fiduciary duties
17 owed to plaintiff, as herein described, plaintiff has been required to incur actual damages
18 including, but not limited to, diminution of the Property's value, attorneys' fees, costs, interest
19 and other damages incurred in plaintiff's defense to protect his ownership and possessory
20 interests in the Property against the unlawful foreclosure activities of defendants, and each of
21 them, in the amount of \$180,000.00.

22 90 As a further proximate result of the defendant's American Mutual's breach of its
23 fiduciary duties owed to plaintiff as herein described, , as herein above alleged, plaintiff has
24 suffered severe humiliation, mental anguish, and emotional and physical distress, and has been
25 injured in mind and body in the sum of \$760,000.00.

26 91. As shown in the facts pleaded hereinabove, American Mutual's conduct was
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1 intended to cause injury to plaintiff or was despicable conduct carried on by this defendant
2 resulting in a cruel and unjust hardship in conscious disregard of plaintiff's rights, and was
3 conducted with the intention to deprive plaintiff of property, legal rights, or otherwise cause
4 injury, such as to constitute malice under California Civil Code §3294. Defendant American
5 Mutual's acts were done knowingly, willfully, and with malicious intent with a conscious
6 reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to cruel and unjust
7 hardship in conscious disregard of his rights, such that plaintiff is entitled to punitive damages
8 appropriate to punish or set an example of this defendant in the amount of \$850,000.00.

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10 **FIFTH CLAIM FOR RELIEF**
11 **(Breach of Fiduciary Duty as to Defendant American**
12 **Mutual, Defendant Countrywide, and Defendant B of A)**

13 92. Plaintiff Zarate incorporates by reference Paragraphs 1 through 91 as though
14 fully set forth herein.

15 93. Plaintiff retained defendant American Mutual to act as the mortgage broker. Upon
16 American Mutual's retention as a mortgage broker, a fiduciary relationship was created between
17 American Mutual and plaintiff whereby as plaintiff's fiduciary, defendant American Mutual owed
18 plaintiff the fiduciary duties of loyalty, diligence, trust, confidence, and due care with the
19 affirmative duty to refrain from self-dealing and to act in the best interest of the plaintiff
20 against all other competing interests.

21 94. Plaintiff is informed and believes, and upon such information and belief, and in
22 doing the things described herein, alleges that defendant American Mutual, while acting as
23 plaintiff's fiduciary mortgage broker, also acted as the agent of defendant Countrywide Bank.
24 This belief is based on two (2) considerations: (1) the 1003 Fannie Mae Form 1003 loan
25 application states that the application for the purchase money loan is to be filled out with the aid
26 of the lender, and it an employee of defendant American Mutual who actually filled out the
27 form, and (2) in addition to the broker fee earned by American Mutual and paid by the loan
28 funds, Countrywide Bank separately paid a 'yield spread premium' of \$17,850.00 to American

1 Mutual as a kick back reward fee for ‘steering’ the plaintiff into a more expensive loan, a loan
2 with terms that more favored the lender’s interests rather than the borrower’s interests. Acting
3 as the principal to the defendant American Mutual, the agent, defendant Countrywide Bank, is
4 vicariously charged with the liability imposed on American Mutual because, as described
5 below, American Mutual’s act in breach of its fiduciary duties owed plaintiff was conducted
6 within the course and scope of the agency relationship then existing between defendant
7 American Mutual and defendant Countrywide Bank.

8 95. Defendant American Mutual breached the fiduciary duties owed to plaintiff
9 when in its capacity as plaintiff’s mortgage broker, failed to disclose the material facts
10 described in plaintiff’s Second Claim for Relief that were within its knowledge and steered,
11 counseled, and directed plaintiff to accept the \$595,000.00 loan product. This action of
12 steering the plaintiff into the loan without disclosure of the above-described material facts
13 within its knowledge was in violation of the fiduciary duties of loyalty, diligence, trust,
14 confidence, disclosure, and due care owed to plaintiff, and, in particular, the affirmative duty to
15 refrain from self-dealing and to act in the best interest of the plaintiff against all other
16 competing interests including its own.

17 96. Eventually, as a result of the of the actions of defendant American Mutual, as
18 described in this Claim for Relief, the refinance loan was issued which eventually has led to the
19 initiation of non-judicial foreclosure proceedings.

20 97. As a result of the defendant’s American Mutual’s breach of the fiduciary duties
21 owed to plaintiff, as herein described, plaintiff has been required to incur actual damages
22 including, but not limited to, diminution of the Property’s value, attorneys’ fees, costs, interest
23 and other damages incurred in plaintiff’s defense to protect his ownership and possessory
24 interests in the Property against the unlawful foreclosure activities of defendants, and each of
25 them, in the amount of \$180,000.00.

26 98. As a further proximate result of the defendant’s American Mutual’s breach of its
27 fiduciary duties owed to plaintiff as herein described, , as herein above alleged, plaintiff has
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1 suffered severe humiliation, mental anguish, and emotional and physical distress, and has been
2 injured in mind and body in the sum of \$760,000.00.

3 99. As shown in the facts pleaded hereinabove, American Mutual's conduct was
4 intended to cause injury to plaintiff or was despicable conduct carried on by this defendant
5 resulting in a cruel and unjust hardship in conscious disregard of plaintiff's rights, and was
6 conducted with the intention to deprive plaintiff of property, legal rights, or otherwise cause
7 injury, such as to constitute malice under California Civil Code §3294. Defendant American
8 Mutual's acts were done knowingly, willfully, and with malicious intent with a conscious
9 reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to cruel and unjust
10 hardship in conscious disregard of his rights, such that plaintiff is entitled to punitive damages
11 appropriate to punish or set an example of this defendant in the amount of \$850,000.00.

12 **SIXTH CLAIM FOR RELIEF**
13 **(Civil Conspiracy to Defraud as to All Defendants)**

14 100. Plaintiff Zarate incorporates by reference Paragraphs 1 through 99 as though
15 fully set forth herein.

16 101. Plaintiff alleges that the defendants, and each of them, had a duty to disclose
17 to plaintiff accurate, truthful, and complete information regarding the subject loan transaction.

18 102. As described in plaintiff's First Claim for Relief, plaintiff further alleges that
19 defendants American Mutual and Countrywide misrepresented plaintiff's income on the
20 application and then represented to plaintiff that he could afford and qualified for the loan; that
21 he earned sufficient income to repay the loan. Defendants made these representations to plaintiff
22 even though none of them had conducted an investigation to verify plaintiff's income or
23 otherwise determine his suitability for the loan. These defendants made the above-described
24 statements and misrepresentations even though they knew such statements were false. In
25 deciding to enter into the loan agreement with defendants, plaintiff reasonably relied on
26 defendant's employee to fill in the application truthfully and reasonably relied on the false
27 representations that plaintiff was qualified for and could afford the subject loan. As shown

1 by their actions, each of the defendants knew and impliedly or expressly understood,
2 acknowledged and ratified the actions of each of the other defendants in pursuit of the
3 exceptional profits earned by each defendant from the specious transactions that emanated
4 from the issuance of this loan and millions of like and similar loans. By all this actions this
5 defendants in concert permitted and falsely created , and accepted the rapidly and fraudulent
6 increase of this Property value, to make the property owner believed there was equity in the
7 property to additionally motivate him the sale of the refinance of the loan. , **and all together**
8 **this lender increased the risk that plaintiff borrower would lose this home or property in**
9 **the very near future by way of foreclosure .**

10 103. The fraudulent acts of these defendants were committed pursuant to and in
11 furtherance of an agreement made between all defendants herein to fraudulently induce home
12 Borrowers , of which plaintiff was one, to enter into unaffordable home purchase or refinance
13 loans whether said borrowers were qualified for or could afford them. Defendants did these acts
14 motivated by the enormous fraudulent profits to be made by selling like loans in the secondary
15 banking market and pooling these loans into a trust for securitization and sales on the open
16 market as described in the "GENERAL ALLEGATIONS", above.

17 104. At all times mentioned herein, defendants, and each of them, were acting in
18 concert with each other and ratified and approved the above-described fraudulent conduct by the
19 other defendant.

20 105. As a direct and proximate result of these defendants' agreement and conspiracy
21 to commit the fraudulent conduct described herein, plaintiff suffered actual damages including,
22 but not limited to, diminution of the Property's value, attorneys' fees, costs, interest and other
23 damages incurred in plaintiff's defense to protect his ownership and possessory interests in the
24 Property against the unlawful foreclosure activities of defendants, and each of them, in the
25 amount of \$180,000.00.

26 106. As a further proximate result of actions of defendants, and each of them, in
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1 conspiring to defraud plaintiff, as alleged herein, plaintiff has suffered severe humiliation,
2 mental anguish, and emotional and physical distress, and has been injured in mind and body in
3 the sum of \$760,000.00.

4 107. As shown in the facts pleaded hereinabove, the conduct of the defendants, and
5 each of them, was intended to cause injury to plaintiff or was despicable conduct carried on by
6 these defendants resulting in a cruel and unjust hardship in conscious disregard of plaintiff's
7 rights, and was conducted with the intention to deprive plaintiff of property, legal rights, or
8 otherwise cause injury, such as to constitute malice under California Civil Code §3294. The
9 acts of defendants, and each of them, were done knowingly, willfully, and with malicious intent
10 with a conscious reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to
11 cruel and unjust hardship in conscious disregard of his rights, such that plaintiff is entitled to
12 punitive damages appropriate to punish or set an example of this defendant in the amount of
13 \$850,000.00.

14 **SEVENTH CLAIM FOR RELIEF**
15 **(Civil Conspiracy to Defraud as to All Defendants)**

16 108. Plaintiff Zarate incorporates by reference Paragraphs 1 through 107 as though
17 fully set forth herein.

18 109. Plaintiff alleges that the defendants, and each of them, had a duty to disclose
19 to plaintiff accurate, truthful, and complete information regarding the subject loan transaction.

20 110. As described in plaintiff's Second Claim for Relief, plaintiff further alleges that
21 defendants American Mutual and Countrywide failed to disclose the material facts listed in
22 plaintiff's Second Claim for Relief. These defendants failed to disclose the listed material facts
23 even though they knew the disclosure of the facts existed, and that if they were disclosed to the
24 plaintiff, the disclosures in all probability would have caused him to decline the loan offer
25 made by the defendant Countrywide. As shown by their actions, each of the defendants knew
26 and impliedly or expressly understood, acknowledged and ratified the actions of each of the
27 other defendants in pursuit of the exceptional profits earned by each defendant from the
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1 specious transactions that emanated from the issuance of this loan and millions of like and
2 similar loans.

3 111. The fraudulent acts of these defendants were committed pursuant to and in
4 furtherance of an agreement made between all defendants herein to fraudulently induce home
5 borrowers, of which plaintiff was one, to enter into unaffordable home purchase or refinance
6 loans whether said purchaser/borrowers were qualified for or could afford them. Defendants did
7 these acts motivated by the enormous fraudulent profits to be made by selling like loans in the
8 secondary banking market and pooling these loans into a trust for securitization and sales on the
9 open market as described in the "GENERAL ALLEGATIONS", above.

10 112. At all times mentioned herein, defendants, and each of them, were acting in
11 concert with each other and ratified and approved the above-described fraudulent conduct by the
12 other defendant. By all this actions this defendants in concert permitted and falsely created , and
13 accepted the rapidly and fraudulent increase of this Property value, to make the property owner
14 believed there was equity in the property to additionally motivate him the sale of the refinance of
15 the loan. , and all together **this lender increased the risk that plaintiff borrower would lose**
16 **this home or property in the very near future by way of foreclosure .**

17 113. As a direct and proximate result of these defendants' agreement and conspiracy
18 to commit the fraudulent conduct described herein, plaintiff suffered actual damages including,
19 but not limited to, diminution of the Property's value, attorneys' fees, costs, interest and other
20 damages incurred in plaintiff's defense to protect his ownership and possessory interests in the
21 Property against the unlawful foreclosure activities of defendants, and each of them, in the
22 amount of \$180,000.00.

23 114. As a further proximate result of actions of defendants, and each of them, in
24 conspiring to defraud plaintiff, as alleged herein, plaintiff has suffered severe humiliation,
25 mental anguish, and emotional and physical distress, and has been injured in mind and body in
26 the sum of \$760,000.00.
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115. As shown in the facts pleaded hereinabove, the conduct of the defendants, and each of them, was intended to cause injury to plaintiff or was despicable conduct carried on by these defendants resulting in a cruel and unjust hardship in conscious disregard of plaintiff's rights, and was conducted with the intention to deprive plaintiff of property, legal rights, or otherwise cause injury, such as to constitute malice under California Civil Code §3294. The acts of defendants, and each of them, were done knowingly, willfully, and with malicious intent with a conscious reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to cruel and unjust hardship in conscious disregard of his rights, such that plaintiff is entitled to punitive damages appropriate to punish or set an example of this defendant in the amount of \$850,000.00.

EIGHTH CLAIM FOR RELIEF
(Declaratory and Injunctive Relief re Civil Code Section
2923.5 as to Defendant MERS and Defendant Mellon)

116. Plaintiff Zarate incorporates by reference Paragraphs 1 through 115 as though fully set forth herein.

117. Because defendant MERS in filing and serving the Notice of Default violated the requirements of Civil Code Section 2923.5, the Notice of Default and the Notice of Trustee's Sale are null and void

118. Plaintiff at all times relevant to this complaint, was the lawful owner in fee of the Property at issue.

119. Civil Code Section 2923.5 in pertinent part requires:

2923.5(a).

(1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).

(2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the

borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default filed pursuant to Section 2924 shall include a declaration from the mortgagee, beneficiary, or authorized agent that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent.

(c) . . .

(d) . . .

(e) For purposes of this section, a "borrower" shall include a mortgagor or trustor.

120. Civil Code § 2923.5 is foundational in nature and is a condition precedent to obtaining the power to initiate a non-judicial trustee's foreclosure sale. It places a mandatory duty on the foreclosing party to make contact with the defaulting party at least thirty (30) days prior to the filing and service of the Notice of Default on the plaintiff. The foreclosing party must discuss the borrower's financial situation and explore options for the borrower to avoid foreclosure. It also requires the foreclosing party to provide a toll-free HUD telephone number to the defaulting trustor/borrower. The foreclosing party who has complied with the § 2923.5 contact requirements must then declare under penalty of perjury in the Notice of Default that it has complied. If the foreclosing party made reasonable and diligent good faith efforts to contact the borrowers but was unable to do so, the foreclosing party must by way of declaration incorporated into the Notice of Sale describe in detail and under penalty of perjury its due diligence in its attempt to comply with

1 the § 2923.5 requirements.

2 121. In violation of plaintiff's rights under Civil Code § 2923.5, neither defendant
3 Mellon nor defendant MERS, the alleged parties in interest with purported standing to initiate
4 foreclosure proceedings, made the required contact with plaintiff thirty (30) days prior to the
5 filing and service of the Notice of Default to discuss the plaintiff's financial situation and
6 explore options for the plaintiff to avoid foreclosure and provide a toll-free HUD telephone
7 number.

8 122. Plaintiff has no remedy at law for the injuries and damages being suffered or that
9 are threatened as plaintiff will be required to institute a multiplicity of suits to regain rightful
10 title, ownership and possession of the real property at issue herein if these defendants are
11 allowed to encumber, sell or otherwise transfer title, possession, or ownership of the real
12 property to another party at the foreclosure sale.

13 123. As a result of this violation, defendant Mellon failed to declare in the Notice of
14 Default that it had made the required contact, and further failed to describe by declaration
15 incorporated into the Notice of Sale its good faith efforts to contact the plaintiff in compliance
16 with § 2923.5.

17 124. As a further result of these violations of the provisions of Civil Code § 2923.5,
18 the Property is scheduled to be sold at a foreclosure sale.

19 125. By reason of these defendants' conduct in violating the provisions and
20 requirements found in Civil Code § 2923.5, Plaintiff is entitled to an equitable decree declaring
21 that the Notice of Default filed and served on the Plaintiff is null and void and further enjoining
22 these defendants, and each of them, from continuing to allege and assert any claim as to an
23 enforceable secured or unsecured claim against property of the estate in bankruptcy.

24 126. Plaintiff seeks a judicial declaration from this court . it is necessary that this
25 Court declare the actual rights and obligations of the parties according to fairness justice
26 and Law , and make a determination as to the validity, nature and extent that defendants
27

1 claimed foreclosure procedures are in violation of 2923.5 and foreclosure documents and
2 procedures are declared null and void by an order of the court..

3 127. Further, plaintiff has incurred fees, costs, and expenses to protect his interests in
4 the Property during foreclosure proceedings.

5 128. Tender requirement should not be applied in Plaintiff's case because Plaintiff alleges
6 fraud in the origination of the loan in his complaint, any tender requirement would be inequitable
7 for the Plaintiff. Additionally, Plaintiff is demanding \$1,790,000.00 in his complaint the potential
8 damages in this case exceeds the amount of the tender requirement. Plaintiff is now indigent mainly
9 because of the actions of Defendants it would be unjust to require Plaintiff to tender. Plaintiff
10 alleges under information and believe that Defendants have already factored in and adjusted for
11 losses and cost to defend future claims in the transaction by acquisition, merging, successor in
12 interest or assigning of Plaintiff's loan, and by additionally receiving government bailouts. To
13 require plaintiff to tender in order to defend his property would be unjust and inequitable
14 considering the fact that defendant banks are to blame for inflated property values which have
15 dropped 50% to 75% since it's peak. Plaintiff request that the Court declare that tender is not
16 required in Plaintiff's situation.

17 **NINTH CLAIM FOR RELIEF**
18 **(Breach of Contract as to Defendant B of A)**

19 129. Plaintiff Zarate incorporates by reference Paragraph 1 through 128 as though
20 fully set forth herein.

21 130. On or about June, 2009, defendant B of A, on its internet website, falsely and
22 fraudulently represented and offered to Countrywide customers, of which plaintiff was one, that
23 if plaintiff qualified under "Bank of America's National Home Ownership Retention Program
24 for Countrywide Customer's" loan criteria, then as a Countrywide customer, B of A would modify
25 the existing home loan reducing the principal to the appraised value of the home plus 5%. This
26 representation constituted an offer to contract.

27 131. Because the plaintiff qualified under the terms of the offer, on or about June, 2009,
28 plaintiff accepted by telephone defendant B of A's offer to modify his loan agreement with

1 Countrywide Loans and/or Countrywide Bank, and a contract was formed.

2 132. Plaintiff performed all conditions, covenant, and promises on plaintiff's part to
3 be performed in accordance with the terms and conditions set forth on "Bank of America's
4 National Home Ownership Retention Program for Countrywide Customers."

5 133. Plaintiff is informed and believes, and on that basis alleges, that the beneficiary
6 breached this agreement by failing to modify the original purchase loan to conform to
7 the terms set forth in "Bank of America's National Home Ownership Retention Program for
8 Countrywide Customers" that defendant B of A would reduce the principal of the loan to the
9 appraised value of the Property plus 5%.

10 134. Plaintiff reasonably relied on the representations set forth in "Bank of America's
11 National Home Ownership Retention Program for Countrywide Customers" in that plaintiff
12 would not have entered into the agreement had plaintiff known and understood the true fact
13 that defendant B of A would not perform under the newly formed agreement by executing a
14 modified home loan agreement.

15 135. As a consequence of defendant B of A's breach of the agreement, plaintiff has been
16 damaged in that plaintiff now faces foreclosure proceedings and must now expend energy, money,
17 and time to defend his proprietary interest(s) in the Property.

18 136. Plaintiff is informed and believes and thereon alleges that he will incur further
19 damages as a result of defendant's B of A breach of contract in an amount according to proof and
20 reserves the right to amend this complaint to allege these further damages when known.

21 **TENTH CLAIM FOR RELIEF**
22 **(Fraud and Misrepresentation as to Defendant B of A)**

23 137. Plaintiff Zarate incorporates by reference Paragraph 1 through 136 as though
24 fully set forth herein.

25 138. On or about June, 2009, defendant B of A, on its internet website, falsely and
26 fraudulently represented and offered to Countrywide customers, of which plaintiff was one, that
27 if plaintiff qualified under "Bank of America's National Home Ownership Retention Program
28

1 for Countrywide Customers”, then as a Countrywide customer, B of A would modify the
2 existing home loan plaintiff had entered in to with Countrywide Loans and/or Countrywide
3 Bank, reducing the principal of the loan to the Property’s appraised value plus 5%.
4 This representation constituted an offer to contract.

5 139. Plaintiff is also informed and believes, and on that basis alleges, that B of A had no
6 intentions to modified no ones Loan to Property Value and additionally 5% equity to retain in
7 the property for home owners to keep their home or property as advertised, on line to the public.
8 .The representations made by the defendant B of A were in fact false. The true
9 facts were that though B of A made the false and fraudulent representations that it would
10 modify the plaintiff’s home loan to the appraised value of the Property plus 5%, if the Loan
11 criteria qualified, and though plaintiff Loan qualified and accepted the offer, B of A, without
12 excuse or justification, then refused to perform under the agreement.

13 140. When defendant B of A made these representation, it knew them to be false, and
14 these representation were made by this defendant with the intent to defraud and deceive the
15 plaintiff and with the intent to induce plaintiff to act in the manner herein alleged. At the time
16 defendant made the promise to plaintiff, this defendant had no intention of performing what
17 was promised.

18 141. At the time this promise was made and at the time plaintiff took the actions
19 herein alleged, plaintiff was ignorant of this defendant’s secret intention not to perform and
20 plaintiff could not, in the exercise of reasonable diligence have discovered defendant’s secret
21 intention. In reliance on these representations, plaintiff was induced to and did accept
22 defendant B of A’s offer to modify plaintiff’s home loan. Had plaintiff known the true facts,
23 he would not have taken such action. Plaintiff’s reliance on defendant’s representation was
24 justified because the negative political/economic dynamics existing against banks generally
25 and defendant Countrywide, in particular, would reasonably motivate honest response and
26 behavior by B of A, Countrywide’s parent company.

1 142. As a direct and proximate result of these defendant's fraud and
2 misrepresentation as described herein, plaintiff suffered actual damages including, but not
3 limited to, diminution of the Property's value, attorneys' fees, costs, interest and other damages
4 incurred in plaintiff's defense to protect his ownership and possessory interests in the Property
5 against the unlawful foreclosure activities of defendants, and each of them, in the amount of
6 \$180,000.00.

7 143. As a further proximate result of the fraud and misrepresentation of defendant B
8 of A, as alleged herein, plaintiff has suffered severe humiliation, mental anguish, and
9 emotional and physical distress, and has been injured in mind and body in the sum of
10 \$760,000.00.

11 144. As shown in the facts pleaded hereinabove, the conduct of the defendants, and
12 each of them, was intended to cause injury to plaintiff or was despicable conduct carried on by
13 these defendants resulting in a cruel and unjust hardship in conscious disregard of plaintiff's
14 rights, and was conducted with the intention to deprive plaintiff of property, legal rights, or
15 otherwise cause injury, such as to constitute malice under California Civil Code §3294. The
16 acts of defendant B of A were done knowingly, willfully, and with malicious intent
17 with a conscious reckless disregard of the rights of plaintiff; conduct that subjected plaintiff to
18 cruel and unjust hardship in conscious disregard of his rights, such that plaintiff is entitled to
19 punitive damages appropriate to punish or set an example of this defendant in the amount of
20 \$850,000.00.

21 **ELEVENTH CLAIM FOR RELIEF**
22 **(Declaratory and Injunctive Relief as to Defendant Recontrust,**
23 **Defendant Countrywide Loans, and Defendant Mellon)**

24 145. Plaintiff incorporates by reference Paragraphs 1 through 144 as though fully set
25 forth herein.

26 146. The Notice of Default and Notice of Trustee's Sale are null and void, because,
27 Plaintiff is informed and believes, none of these named defendants who may attempt to enforce
28

1 the provisions of the Promissory Note or who are now attempting to enforce these provisions by
2 way of the enforcement provision of the Note's Deed of Trust, are in possession of the original
3 Promissory Note as required by the federal Uniform Commercial Code § 3-301. ("UCC")

4 147. UCC § 3-301 specifically identifies the persons who are entitled to enforce a
5 security interest by, among other means, instituting a foreclosure sale under a deed of trust. It
6 states in whole:

7 "Person entitled to enforce" an instrument means (i) the
8 holder of the instrument, (ii) a nonholder in possession
9 of the instrument who has the rights of a holder, or (iii)
10 a person not in possession of the instrument who is
11 entitled to enforce the instrument pursuant to Section
12 3-309 or 3-418(d). A person may be a person entitled to
enforce the instrument even though the person is not the
owner of the instrument or is in wrongful possession of
the instrument.

13 The statute is exclusive rather than inclusive in nature, and those who are not identified under
14 3-309 requirements do not have the right to enforce such an interest.

15 148. Plaintiff is informed and believes, and thereon alleges that none of the named
16 defendants nor any other entity or person directly participating in the foreclosure proceedings
17 were, and are not now, in possession of the Promissory Note nor were, and are not now,
18 beneficiaries, assignees, or employees of the person or entity in possession of the Note, and,
19 pursuant to UCC § 3-301, were not otherwise entitled to payment. Moreover,
20 plaintiff is informed and believes, and thereon alleges that said defendants are not "person[s]
21 entitled to enforce" the security interest on the Property, as that term is defined in UCC
22 § 3-301.

23 149. The instruments or other documents showing a chain of title to the Property has
24 either been lost, stolen, destroyed, fabricated, separated, and/or unlawfully altered or reproduced.
25 Plaintiff is informed and believes that the required documentation of title required to be attached
26 to the PSA is non-existent in violation of the PSA rules Section 2.01(c) 2.01(c)(i) (A) of the PSA
27 and 3.11. This is because no such schedule was attached to the document (PSA) filed with the SEC.
28

1 Further, there is no indication or recording of the Pooling and Servicing Agreement regarding
2 the Property noted in Sacramento County Recorder's Office that would show a complete chain
3 of endorsement of the Mortgage Note. There has been no cognizable chain of title assignments
4 to the Deed of Trust for the Wilton property recorded in the Sacramento County Recorder's
5 Office.

6 150. Plaintiff has no remedy at law for the injuries and damages being suffered or that
7 are threatened as plaintiff will be required to institute a multiplicity of suits to regain rightful
8 title, ownership and possession of the real property at issue herein if these defendants are
9 allowed to encumber, sell or otherwise transfer title, possession, or ownership of the real
10 property to another party at the foreclosure sale.

11 151. As a direct and proximate result of wrongful actions of said defendants, if said
12 defendants are unable to produce the original Promissory Note and yet still file and serve the
13 Notice of Default, the Notice of Trustee's Sale and then conduct non-judicial foreclosure sale,
14 without maintaining actual possession of the promissory note in violation of the "possession"
15 requirement set forth in UCC § 3-301, the plaintiff will suffer damages, including,
16 but not limited to, loss of possession and ownership of the Property, direct monetary losses,
17 consequential damages, and emotional distress.

18 152. As a direct and proximate result of wrongful actions of said defendants, the
19 plaintiff is in imminent danger of losing their possessory and ownership interests in the
20 Property by way of the sale and purchase of the Property at a pending foreclosure sale..

21 153. By reason of these defendants' conduct in violating the provisions and
22 requirements found in Commercial Code § 3301, Plaintiff is entitled to an equitable decree
23 declaring that the Notice of Default and the Notice of Trustee's Sale filed and served on the
24 Plaintiff Zarate are null and void and further enjoining these defendants, and each of them, from
25 continuing to allege and assert any claim as to an enforceable secured or unsecured claim
26 against property of the estate in bankruptcy.
27

1 154 . Plaintiff seeks a judicial declaration from this court . it is necessary that this Court
2 declare the actual rights and obligations of the parties according to fairness and justice , and make
3 a determination as to the validity, nature and extent that defendants claimed debt has no standing
4 against Plaintiff and foreclosure documents are null and void.

5 155. Tender requirement should not be applied in Plaintiff's case because Plaintiff alleges
6 fraud in the origination of the loan in his complaint, any tender requirement would be inequitable
7 for the Plaintiff. Additionally, Plaintiff is demanding \$1,790,000.00 in his complaint the potential
8 damages in this case exceeds the amount of the tender requirement. Plaintiff is now indigent mainly
9 because of the actions of Defendants it would be unjust to require Plaintiff to tender. Plaintiff
10 alleges under information and believe that Defendants have already factored in and adjusted for
11 losses and cost to defend future claims in the transaction by acquisition, merging, successor in
12 interest or assigning of Plaintiff's loan, and by additionally receiving government bailouts.
13 To require plaintiff to tender in order to defend his property would be unjust and inequitable
14 considering the fact that defendant banks are to blame for inflated property values which have
15 dropped 50% to 75% since it's peak. Plaintiff request that the Court declare that tender is not
16 required in Plaintiff's situation.

17 156. Further, plaintiff have incurred fees, costs, and expenses to protect his interests
18 in the Property during foreclosure proceedings according to proof.

19 **TWELFTH CLAIM FOR RELIEF**
20 **(Declaratory and Injunctive Relief as to Defendant Recontrust,**
21 **Defendant Countrywide Loans, and Defendant Mellon)**

22 157. Plaintiff Zarate incorporates by reference Paragraphs 1 through 156 as though
23 fully set forth herein.

24 158. The Notice of Default and Notice of Trustee's Sale are null and void, because,
25 Plaintiff is informed and believe, none of these named defendants who may attempt to enforce
26 the provisions of the Promissory Note or who are now attempting to enforce these provisions
27 by way of the enforcement provision of the Note's Deed of Trust, has no standing to enforce the
28

1 Deed of Trust in that the Promissory Note is an “interest only” payment Note.

2 159. Under Uniform Commercial Code § 3-304(c)(“UCC”), a borrower is not in
3 default if he has fallen behind on the interest payments but not the payment(s) on the principal.
4 Section 3-304(c) specifically states:

5 (c) Unless the due date of principal has been
6 accelerated, an instrument does not become overdue
7 if there is default in payment of interest but no default
in payment of principal.

8 160. The Promissory Note can be described as a “negative adjustable rate mortgage”
9 and an “instrument” for Section 3-304 purposes, whereby the plaintiff was required to make
10 interest only payments on the refinance loan. Neither the known true beneficiary, defendant
11 Mellon, of the Deed of Trust, described in the PSA, MERS the pseudo “nominee” beneficiary,
12 nor the Master Servicer under the PSA, the party authorized by the PSA to foreclose under
13 Section 3.11 of the PSA, have “accelerated” the payoff of the note, and, pursuant to the
14 requirements of Section 3-304, the payments on the Note were not, and are not now, “overdue”,
15 and the Note is not subject to foreclosure proceedings.

16 161. Notwithstanding the requirements of UCC § 3304, the defendant MERS has
17 wrongfully begun non-judicial foreclosure proceedings by causing a Notice of Default to be
18 filed with the Sacramento County Recorder’s Office and served on the plaintiff Zarate, and
19 defendant Mellon has issued and served the Notice of Trustee’s Sale on the plaintiff Zarate.

20 162. Plaintiff has no remedy at law for the injuries and damages being suffered or that
21 are threatened as plaintiff will be required to institute a multiplicity of suits to regain rightful
22 title, ownership and possession of the real property at issue herein if these defendants are
23 allowed to encumber, sell or otherwise transfer title, possession, or ownership of the real
24 property to another party at the foreclosure sale.

25 163. As a direct and proximate result of these wrongful actions of defendant MERS
26 and other defendants, including defendant Mellon, participating in the non-judicial foreclosure
27 proceedings on the Property, at a time when the payments were not overdue on the note and in
28

1 violation of the requirements set forth in UCC § 3-304, the plaintiff will suffer
2 damages, including, but not limited to, loss of possession and ownership of the Property, direct
3 monetary losses, consequential damages, and emotional distress.

4 164. As a direct and proximate result of wrongful actions of said defendants, the
5 plaintiff is in imminent danger of losing his possessory and ownership interests in the Property
6 by way of the sale and purchase of the Property at a pending foreclosure sale.

7 165. By reason of these defendants' conduct in violating the provisions and
8 requirements found in UCC § 3-304, Plaintiff is entitled to an equitable decree
9 declaring that the Notice of Default and the Notice of Trustee's Sale filed and served on the
10 Plaintiff is null and void and further enjoining these defendants, and each of them, from
11 continuing to allege and assert any claim as to an enforceable secured or unsecured claim
12 against property of the estate in bankruptcy.

13 167. For such described reasons and 3-304 (c) described above , Plaintiff declares that his
14 debt is not in default, . Plaintiff seeks a judicial declaration from this court . it is necessary
15 that this Court declare the actual rights and obligations of the parties according to law, and
16 make a determination as to the validity, nature and extent that defendants claimed debt is not
17 in default by this plaintiff and foreclosure documents are null and void.

18 168. Tender requirement should not be applied in Plaintiff's case because Plaintiff alleges
19 fraud in the origination of the loan in his complaint, any tender requirement would be inequitable
20 for the Plaintiff. Additionally, Plaintiff is demanding \$1,790,000.00 in his complaint the potential
21 damages in this case exceeds the amount of the tender requirement. Plaintiff is now indigent mainly
22 because of the actions of Defendants it would be unjust to require Plaintiff to tender. Plaintiff
23 alleges under information and believe that Defendants have already factored in and adjusted for
24 losses and cost to defend future claims in the transaction by acquisition, merging, successor in
25 interest or assigning of Plaintiff's loan, and by additionally receiving government bailouts. To
26 require plaintiff to tender in order to defend his property would be unjust and inequitable
27 considering the fact that defendant banks are to blame for inflated property values which have
28

1 dropped 50% to 75% since it's peak. Plaintiff request that the Court declare that tender is not
2 required in Plaintiff's situation.

3 **THIRTEENTH CLAIM FOR RELIEF**
4 **(Declaratory and Injunctive Relief as to Defendant**
5 **Countrywide Loans, Defendant Recontrust and Defendant Mellon)**

6 169. Plaintiff incorporates by reference Paragraphs 1 through 168 as though fully set
7 forth herein.

8 170. The Notice of Default and Notice of Trustee's Sale are declared null and void,
9 because, Plaintiff is informed and believes, none of these named defendants who may attempt to
10 enforce the provisions of the Promissory Note or who are now attempting to enforce these
11 provisions by way of the enforcement provision of the Note's Deed of Trust, has no standing to
12 enforce the Deed of Trust nor are they parties in interest. This is because, (1) defendant MERS
13 was not a true beneficiary under the Deed of Trust, and had no standing to initiate foreclosure
14 proceedings, (2) defendant Mellon, the party purported and alleged in the PSA to be the Trustee
15 of the PSA and signatory to the PSA, agreed when it executed the PSA that the Master Servicer
16 of the PSA, defendant Countrywide Loans, would conduct foreclosure proceedings for those
17 loans covered by the PSA, and (3) upon information and belief, the Promissory Note was sold
18 and assigned by defendant Countrywide Bank to defendant Countrywide Loans without
19 endorsement or allonge, who then sold and assigned to the Promissory Note to defendant
20 Mellon without endorsement or allonge, thereby leaving empty the chain of assignment or
21 ownership to the Promissory Note.

22 171. Each of the three reasons cited in Paragraph 165, above, standing alone, is
23 sufficient to show that neither defendant MERS nor defendant Mellon are parties in interest
24 with standing to conduct or participate in the foreclosure proceedings.

25 172. Plaintiff has no remedy at law for the injuries and damages being suffered or
26 that are threatened as plaintiff will be required to institute a multiplicity of suits to regain
27 rightful title, ownership and possession of the real property at issue herein if these defendants
28

1 are allowed to encumber, sell or otherwise transfer title, possession, or ownership of the real
2 property to another party at the foreclosure sale.

3 173. As a direct and proximate result of the wrongful action of defendant MERS in
4 filing and serving the Notice of Default and the Notice of Trustee's Sale the plaintiff, and
5 each of them, have suffered damages, including, but not limited to, direct monetary losses,
6 consequential damages, and emotional distress.

7 174. As a further direct and proximate result of wrongful actions of said defendants,
8 the plaintiff is in imminent danger of losing his possessory and ownership interests in the
9 Property by way of the sale and purchase of the Property at a pending foreclosure sale.

10 175. By reason of these defendants' conduct as described in Paragraph 165, above,
11 whereby (1) defendant MERS was not a true beneficiary under the Deed of Trust, and had no
12 standing to initiate foreclosure proceedings, (2) defendant Mellon, the party purported and
13 alleged in the PSA to be the Trustee of the PSA and signatory to the PSA, agreed when it
14 executed the PSA that the Master Servicer of the PSA, defendant Countrywide Loans, would
15 conduct foreclosure proceedings for those loans covered by the PSA, and (3) upon information
16 and belief, the Promissory Note was sold and assigned by defendant Countrywide Bank to
17 defendant Countrywide Loans without endorsement or allonge, who then sold and assigned to
18 the Promissory Note to defendant Mellon without endorsement or allonge, thereby leaving
19 empty the chain of assignment or ownership to the Promissory Note, Plaintiff
20 is entitled to an equitable decree declaring that the Notice of Default and the Notice of
21 Trustee's Sale filed and served on the Plaintiff is null and void and further enjoining these
22 defendants, and each of them, from continuing to allege and assert any claim as to an
23 enforceable secured or unsecured claim against property of the estate in bankruptcy.

24 176. Plaintiff seeks a judicial declaration from this court . it is necessary that this Court declare
25 the actual rights and obligations of the parties, according to fairness and justice and make a
26 determination as to the validity, nature and extent that defendants claimed purported
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1 beneficiaries MERS and Mellon have no standing or beneficial interest in the property, and
2 their foreclosure executed documents and procedures have no legal effect against Plaintiff
3 and are declared null and void by this court..

4 177 . Tender requirement should not be applied in Plaintiff's case because Plaintiff alleges
5 fraud in the origination of the loan in his complaint, any tender requirement would be inequitable
6 for the Plaintiff. Additionally, Plaintiff is demanding \$1,790,000.00 in his complaint the potential
7 damages in this case exceeds the amount of the tender requirement. Plaintiff is now indigent mainly
8 because of the actions of Defendants it would be unjust to require Plaintiff to tender. Plaintiff
9 alleges under information and believe that Defendants have already factored in and adjusted for
10 losses and cost to defend future claims in the transaction by acquisition, merging, successor in
11 interest or assigning of Plaintiff's loan, and by additionally receiving government bailouts. To
12 require plaintiff to tender in order to defend his property would be unjust and inequitable
13 considering the fact that defendant banks are to blame for inflated property values which have
14 dropped 50% to 75% since it's peak. Plaintiff request that the Court declare that tender is not
15 required in Plaintiff's situation.

16 **FOURTEENTH CLAIM FOR RELIEF**
17 **(Negligence as to Defendant ReconTrust)**

18 178. Plaintiff incorporates by reference Paragraphs 1 through 177 as though fully set
19 forth herein.

20 179. As trustee on deeds of trust, defendant Recontrust has a general duty to
21 conduct the process leading to and the actual non-judicial foreclosure sale "fairly, openly,
22 reasonably, and with due diligence," exercising sound discretion to protect the rights of the
23 mortgagor.

24 180. Plaintiff is informed and believe that defendant Recontrust had an agreement
25 with defendant MERS the alleged "beneficiary" of the deed of trust, and/or its agent, on the
26 Property to the effect that Recontrust would only cancel or continue non-judicial foreclosure
27 sale if the beneficiary approves.
28

1 181. Defendant Recontrust has committed unfair and deceptive acts and violated its
2 duty owed to plaintiff to fairly, openly, and reasonably, and with due diligence protect the
3 plaintiff's rights as a mortgagor by noticing and conducting the trustee sale by failing to do the
4 following:

- 5 a. Failing to actually identify the actual owner of the Promissory Note in
6 the Notice of Default;
- 7 b. Failing to obtain proof that the beneficiary named in the Notice of
8 Default was the owner of the Promissory Note secured by the Deed of
9 Trust;
- 10 c. By naming MERS in the Deed of Trust as the beneficiary under the Deed
11 of Trust when this defendant knew, or at least should have known, that
12 MERS was never a party to whom the obligation was owed;
- 13 d. Failing to state the name of the original beneficiary in the Notice of
14 Trustee's Sale in violation of CC § 2924f(b)(1); and
- 15 e. Failing to identify a defective or unperfected assignment of Deed of
16 Trust and Substitution of a Trustee.

17 182. Unless enjoined by this Court, this defendant will continue to breach its general
18 duty owed to plaintiff and/or aid and abet therein, and may consummate the foreclosure
19 proceedings by conducting the unlawful non-judicial foreclosure sale .

20 183. As a result of this defendant's violation of its general duty owed to plaintiff to
21 conduct the proceedings, leading to and the actual non-judicial foreclosure sale, fairly, openly,
22 reasonably, and with due diligence, exercising sound discretion to protect the rights of
23 plaintiff, plaintiff has been required to incur damages including, but not
24 limited to, attorneys' fees, costs, interest and other damages incurred in plaintiff's defense to
25 protect his ownership and possessory interests in the Property against the unlawful foreclosure
26 activities of defendants, and each of them, in the amount of \$180,000.00.

1 184. As a further proximate result of defendant's violation and breach of its general
2 duties and obligations owed to plaintiff and the consequences proximately caused by the
3 breach, as herein above alleged, plaintiff has suffered severe humiliation, mental anguish, and
4 emotional and physical distress, and has been injured in mind and body in the sum of
5 \$760,000.00.

6 185. As shown in the facts pleaded hereinabove, this defendant's conduct was
7 intended to cause injury to plaintiff or was despicable conduct carried on by this defendant
8 resulting in a cruel and unjust hardship in conscious disregard of plaintiff's rights, and was
9 conducted with the intention to deprive plaintiff of property, legal rights, or otherwise cause
10 injury, such as to constitute malice under California Civil Code §3294. Defendant
11 ReconTrust's acts were done knowingly, willfully, and with malicious intent with a conscious
12 reckless disregard of the rights of plaintiff conduct that subjected plaintiff to cruel and unjust
13 hardship in conscious disregard of their rights, such that plaintiff is entitled to punitive
14 damages appropriate to punish or set an example of this defendant in the amount of
15 \$850,000.00.

16 **FIFTEENTH CLAIM FOR RELIEF**
17 **(Fraud as to Defendant MERS and Defendant Recontrust)**

18 186. Plaintiff Zarate incorporates by reference Paragraphs 1 through 185 as though
19 fully set forth herein.

20 187. Plaintiff is informed and believes and thereon alleges that defendant MERS
21 together with defendant Recontrust, with malicious intent to defraud and deceive plaintiff Zarate,
22 caused and directed its agent and employee to falsely, fraudulently, and criminally forge and
23 sign the name 'Stacey Kershberg' as the "Attorney in Fact" to the June 4, 2008, attempted
24 Notice of Default.

25 188. Plaintiff Zarate is informed and believes, and on such information and belief,
26 alleges that the time of the forged signing of the attempted Notice of Default, defendant MERS
27 and defendant Recontrust knew that the person signing the Notice of Default was not Stacey
28 Kershberg, and knew that that person had no knowledge of contents Notice of Default

1 document.

2 189. Plaintiff Zarate is informed and believes, and on such information and belief,
3 alleges that at the time of the fraudulent signing of the attempted Trustee's Sale, defendant
4 MERS and defendant Recontrust knew that but for this fraudulent and forged signing of the
5 Notice of Default document, foreclosure proceedings would not be initiated.

6 190. The action of causing an agent and employee to forge the Notice of Default was
7 made with the intent defraud plaintiff Zarate, and was made for the purpose of inducing
8 plaintiff Zarate and others to rely on the forged signature.

9 191. At the time of the forgery as herein alleged, plaintiff Zarate was ignorant of the
10 falsity of the signature and the failure of the purported Notice of Default. Plaintiff Zarate
11 reasonably relied on the truthfulness of the signature and, as a result, was induced to not assert
12 his legal rights and arguments in opposition to the attempted Notice of Default as a defense to
13 the resulting initiation of the foreclosure sale proceedings.

14 192. As a direct and proximate result of defendant's, fraud and deceit in causing and
15 directing defendants' agent and employee to forge the attempted Notice of Default, as alleged
16 herein, plaintiff Zarate has been required to incur damages including, but not limited to,
17 attorneys' fees, costs, interest and other damages incurred in plaintiff Zarate's defense to
18 protect their ownership and possessory interests in the Property against the unlawful
19 foreclosure activities of defendants, and each of them, in the amount of \$180,000.00.

20 193. As a further proximate result of defendant's fraud and deceit in causing and
21 directing defendants' agent and employee to forge the attempted Notice of Default, as alleged
22 herein, plaintiff Zarate has suffered severe humiliation, mental anguish, and emotional and
23 physical distress, and has been injured in mind and body in the sum of \$760,000.00.

24 194. As shown in the facts pleaded herein above, defendant MERS and defendant
25 Recontrust's fraud and deceit, was intended to cause injury to plaintiff Zarate or was
26 despicable conduct carried on by defendant MERS and defendant ReconTrust resulting in cruel
27 and unjust hardship in conscious disregard of plaintiff Zarate's rights, and was conducted with
28 the intention to deprive plaintiff Zarate of property and legal rights or otherwise cause injury,

1 such as to constitute malice under California Civil Code Section 3294. The fraudulent acts
2 described herein above were done knowingly, willfully, and with malicious intent, with a
3 conscious disregard of the rights of plaintiff Zarate. It was conduct that subjected plaintiff to
4 cruel and unjust hardship such, all of which entitle plaintiff to punitive damages in the sum of
5 \$850,000.00.

6 **SIXTEENTH CLAIM FOR RELIEF**
7 **(Fraud as to Defendant MERS and Defendant Mellon)**

8 195. Plaintiff Zarate incorporates by reference Paragraphs 1 through 194 as though fully
9 set forth herein.

10 196. Plaintiff Zarate is informed and believes and thereon alleges that defendant
11 MERS and defendant Mellon, with malicious intent to defraud and deceive plaintiff Zarate,
12 caused and directed its employee to falsely, fraudulently, and criminally forge and sign the
13 name 'Kevin Rudolph' as the "Assistant Secretary" to the June 22, 2010, attempted
14 Substitution of Trustee and Assignment of Deed of Trust from defendant MERS substituting
15 in defendant ReconTrust as Trustee and assigning all beneficial interests in the Deed of Trust to
16 defendant Mellon.

17 197. Plaintiff Zarate is informed and believes, and on such information and belief,
18 alleges that at the time of the forged signing of the attempted substitution and assignment,
19 MERS knew that the person signing the instrument was not Kevin Rudolph, and knew that that
20 person had no knowledge of contents of the substitution and assignment.

21 198. Plaintiff Zarate is informed and believes, and on such information and belief,
22 alleges that at the time of the fraudulent signing of the attempted substitution and assignment ,
23 defendant MERS and defendant Mellon knew that but for this fraudulent and forged signing of
24 the substitution and assignment document, knew that but for this fraudulent and forged signing
25 of the Notice of Default document, foreclosure proceedings would not be initiated.

26 199. The action of causing an employee to forge the substitution and assignment was
27 made with the intent defraud plaintiff Zarate, and was made for the purpose of inducing
28 plaintiff Zarate and others to rely on the forged signature.

1 200. At the time of the forgery as herein alleged, Plaintiff Zarate was ignorant of the
2 falsity of the signature and the failure of the purported substitution and assignment. Plaintiff
3 Zarate reasonably relied on the truthfulness of the signature and, as a result, was induced to not
4 assert his legal rights and arguments in opposition to the attempted substitution and assignment
5 as a defense to the resulting foreclosure sale.

6 201. As a direct and proximate result of defendant's, fraud and deceit in forging the
7 attempted substitution and assignment, as alleged herein, plaintiff Zarate has incurred
8 damages including, but not limited to, attorneys' fees, costs, interest and other damages
9 incurred in plaintiff Zarate's defense to protect their ownership and possessory interests in the
10 Property against the unlawful foreclosure activities of defendants, and each of them, in the
11 amount of \$180,000.00.

12 202. As a further proximate result of defendant's fraud and deceit in forging the
13 attempted substitution and assignment, as alleged herein, plaintiff Zarate has suffered severe
14 humiliation, mental anguish, and emotional and physical distress, and has been injured in mind
15 and body in the sum of \$760,000.00.

16 203. As shown in the facts pleaded herein above, defendant MERS and defendant
17 Mellon's fraud and deceit, was intended to cause injury to plaintiff Zarate or was despicable
18 conduct carried on by defendant MERS and defendant Mellon resulting in cruel and unjust
19 hardship in conscious disregard of plaintiff Zarate's rights, and was conducted with the
20 intention to deprive plaintiff Zarate of property and legal rights or otherwise cause injury, such
21 as to constitute malice under California Civil Code Section 3294. The fraudulent acts described
22 herein above were done knowingly, willfully, and with malicious intent, with a conscious
23 disregard of the rights of plaintiff Zarate. It was conduct that subjected plaintiff to cruel and
24 unjust hardship such, all of which entitle plaintiff Zarate to punitive damages in the sum of
25 \$850,000.00.

26 **SEVENTEENTH CLAIM FOR RELIEF**
27 **(Fraud as to Defendant MERS and Defendant ReconTrust)**

28 204. Plaintiff Zarate incorporates by reference Paragraphs 1 through 203 as though fully

1 set forth herein.

2 205. Plaintiff Zarate is informed and believes and thereon alleges that defendant
3 MERS and defendant ReconsTrust , with malicious intent to defraud and deceive plaintiff Zarate,
4 caused and directed its employees to falsely, fraudulently, and criminally forge and sign the
5 Duplicated substitutions of trustee one with the name of name 'Elisavet Meza as the "Assistant
6 Secretary of MERS " on June 03, of 2008, and a second one with the name "Angelica del
7 Toro as the "Asistant Secretary of MERS " on June 09 2008 both attempted and duplicated
8 Substitutions of Trustee from defendant MERS substituting in defendant ReconTrust as Trustee
9 in the Deed of Trust.

10
11 206. Plaintiff Zarate is informed and believes, and on such information and belief,
12 alleges that at the time of the forged signing of the Duplicate attempted substitutions
13 MERS knew that the person signing each instrument was not Elisavet Meza nor was Angelica
14 Del Toro , and knew that these people had no knowledge of contents of the duplicate substitutions.

15 207. Plaintiff Zarate is informed and believes, and on such information and belief,
16 alleges that at the time of the fraudulent signing of the attempted substitution and assignment ,
17 defendant MERS and defendant Rrcontrust knew that but for this fraudulent and forged
18 signing of the duplicate substitutions, knew that but for this fraudulent and forged signing
19 of the Substitutions of Trustee , foreclosure proceedings would not be initiated.

20 208. The action of causing an employee to forge the substitution and assignment was
21 made with the intent defraud plaintiff Zarate, and was made for the purpose of inducing
22 plaintiff Zarate and others to rely on the forged signature.

23 209. At the time of the forgery as herein alleged, Plaintiff Zarate was ignorant of the
24 falsity of the signature and the failure of the purported substitutions. Plaintiff
25 Zarate reasonably relied on the truthfulness of the signature and, as a result, was induced to not
26 assert his legal rights and arguments in opposition to the attempted substitution
27 as a defense to the resulting foreclosure sale.

28 210. As a direct and proximate result of defendant's, fraud and deceit in forging the

1 attempted substitutions, as alleged herein, plaintiff Zarate has incurred
2 damages including, but not limited to, attorneys' fees, costs, interest and other damages
3 incurred in plaintiff Zarate's defense to protect their ownership and possessory interests in the
4 Property against the unlawful foreclosure activities of defendants, and each of them, in the
5 amount of \$180,000.00.

6 211. As a further proximate result of defendant's fraud and deceit in forging the
7 attempted duplicated substitutions, as alleged herein, plaintiff Zarate has suffered severe
8 humiliation, mental anguish, and emotional and physical distress, and has been injured in mind
9 and body in the sum of \$760,000.00.

10 212. As shown in the facts pleaded herein above, defendant MERS and defendant
11 ReconTrust's fraud and deceit, was intended to cause injury to plaintiff Zarate or was despicable
12 conduct carried on by defendant MERS and defendant ReconTrust resulting in cruel and unjust
13 hardship in conscious disregard of plaintiff Zarate's rights, and was conducted with the
14 intention to deprive plaintiff Zarate of property and legal rights or otherwise cause injury, such
15 as to constitute malice under California Civil Code Section 3294. The fraudulent acts described
16 herein above were done knowingly, willfully, and with malicious intent, with a conscious
17 disregard of the rights of plaintiff Zarate. It was conduct that subjected plaintiff to cruel and
18 unjust hardship such, all of which entitle plaintiff Zarate to punitive damages in the sum of
19 \$850,000.00.

20 **EIGHTEENTH CLAIM FOR RELIEF**
21 **(Fraud as to Defendant ReconTrust and Defendant Mellon)**

22 213. Plaintiff Zarate incorporates by reference Paragraphs 1 through 212 as though fully
23 set forth herein.

24 214. Plaintiff Zarate is informed and believes and thereon alleges that defendant
25 ReconTrust and defendant Mellon, with malicious intent to defraud and deceive plaintiff
26 Zarate, caused its employee to falsely, fraudulently, and criminally forge and sign the name
27 'Nallely Ochoa' as the "Authorized Signer" to the August 3, 2011, attempted Notice of
28 Trustee's Sale.

1 215. Plaintiff Zarate is informed and believes, and on such information and belief,
2 alleges that at the time of the forged signing of the attempted Notice of Trustee Sale,
3 defendant Mellon and defendant ReconTrust knew that the person signing the instrument was
4 not Nallely Ochoa, and knew that that person had no knowledge of contents of the
5 Notice of Trustee Sale.

6 216. Plaintiff Zarate is informed and believes, and on such information and belief,
7 alleges that at the time of the fraudulent signing of the attempted Notice of Trustee's Sale,
8 defendant ReconTrust and defendant Mellon knew that but for this fraudulent and forged signing
9 of the substitution and assignment document, knew that but for this fraudulent and forged signing
10 of the Notice of Default document, foreclosure proceedings would not be initiated.

11 217. The action of causing an employee to forge the Notice of Trustee's Sale was
12 made with the intent defraud plaintiff Zarate, and was made for the purpose of inducing
13 plaintiff Zarate and others to rely on the forged signature.

14 218. At the time of the forgery as herein alleged, plaintiff Zarate was ignorant of the
15 falsity of the signature and the failure of the purported substitution and assignment. Plaintiff
16 Zarate reasonably relied on the truthfulness of the signature and, as a result, was induced to not
17 assert his legal rights and arguments in opposition to the attempted substitution and assignment
18 as a defense to the resulting foreclosure sale.

19 219. As a direct and proximate result of defendant's, fraud and deceit in forging the
20 attempted Notice of Trustee's Sale, as alleged herein, plaintiff Zarate has incurred damages
21 including, but not limited to, attorneys' fees, costs, interest and other damages incurred in
22 plaintiff Zarate's defense to protect their ownership and possessory interests in the Property
23 against the unlawful foreclosure activities of defendants, and each of them, in the amount of
24 \$180,000.00.

25 220. As a further proximate result of defendant's fraud and deceit in forging the
26 attempted Notice of Trustee's Sale, as alleged herein, plaintiff Zarate has suffered severe
27 humiliation, mental anguish, and emotional and physical distress, and has been injured in mind
28 and body in the sum of \$760,000.00.

221. As shown in the facts pleaded herein above, defendant Mellon and defendant ReconTrust's fraud and deceit, was intended to cause injury to plaintiff Zarate or was despicable conduct carried on by defendant Mellon and defendant ReconTrust resulting in cruel and unjust hardship in conscious disregard of plaintiff Zarate's rights, and was conducted with the intention to deprive plaintiff Zarate of property and legal rights or otherwise cause injury, such as to constitute malice under California Civil Code Section 3294. The fraudulent acts described herein above were done knowingly, willfully, and with malicious intent, with a conscious disregard of the rights of plaintiff Zarate. It was conduct that subjected plaintiff Zarate to cruel and unjust hardship such, all of which entitle plaintiff Zarate to punitive damages in the sum of \$850,000.00.

**NINETEENTH CLAIM FOR RELIEF
(Slander of Title as to Defendant MERS)**

222. Plaintiff incorporates by reference Paragraphs 1 through 221 as though fully set forth herein.

223. Defendant MERS, who, at all times herein, was defendant lender Countrywide's "nominee" and purported "beneficiary" under the February 2, 2006, Deed of Trust, without authority, legal right or standing executed the false documents:

1. Notice of Default

- a. Signed on June 3, 2008
- b. Filed on June 4, 2008
- c. No CC § 2923.5 Declaration attached

2. Notices of Trustee's Sale

- a. Signed on September 8, 2008
- b. Filed on September 16, 2008

3. Substitution of Trustee No.1

- a. Signed on June 3, 2008
- b. Recorded on September 16, 2008
- c. Substituted Defendant ReconTrust in place of Defendant CTC

1 **4. Substitution of Trustee No.2**

- 2 a. Dated June 17 Signed on June 18, 2010
- 3 b. Recorded on June 22, 2010
- 4 c. Substituted Defendant ReconTrust in place of Defendant CTC

5 **5. Assignment of Deed of Trust**

- 6 a. Dated June 17, and Signed on June 18, 2010
- 7 b. Recorded on June 22, 2010
- 8 c. Assigned it rights, if any it had, in Deed of trust to Defendant Mellon

9 224. Assuming without admitting that MERS obtained the power and authority from

10 the Deed of Trust to take the above actions, it is readily observed that:

- 11 1. There was no CC § 2923.5 declaration attached to the Notice of Default.
- 12 (Note: Two CC § 2923.5 declarations were filed. The first notes that the
- 13 date of notice was September 10, 2008 executed by Countrywide Home
- 14 Loans. The second notes that the date of notice was March 12, 2010 by
- 15 BAC Home loan Servicing, LP. Both of these notices were after the
- 16 Notice of Default)
- 17 2. MERS made two Substitution of Trustees of the same party
- 18 3. The “assignment” to Defendant Mellon was null and void which further
- 19 determines that Defendant Mellon’s two Notices of Trustee sale, the first
- 20 dated June 22, 2010, the second dated August 1, 2011, were also null
- 21 and void and without legal effect.

22 225. The filings of the above listed documents, and each of them, were wrongful and

23 without privilege.

24 226 . None of these Defendants, whether jointly or severally, is, or at any relevant time,

25 was a trustee, beneficiary or assignee of any beneficiary of any Deed of Trust recorded against the

26 Subject Property. Accordingly, these defendants wrongfully caused the recording of the

27 Assignment of the Deed of Trust, the Notice of Default, and the Substitution of Trustee,against

28 the Subject Property.

1 227. By doing the acts described above, Defendants slandered plaintiff's title to the
2 Subject Property.

3 228. In that the conduct and acts of Defendants violated, among others, California Civil
4 Code section 2924(a)(1)(C), such conduct and acts were not privileged. Plaintiff seeks a judicial
5 declaration from this court. It is necessary that this Court declare the actual rights and obligations
6 of the parties, according to fairness and justice and make a determination as to the validity, nature
7 and extent that defendants claimed purported assignment of Deed of Trust and foreclosure
8 documents and procedures have no legal effect against Plaintiff and foreclosure documents and
9 procedures are null and void..

10 229. As a further proximate result of the wrongful conduct of defendants, and each of
11 them, as herein alleged, plaintiff, and each of them have been required to incur damages
12 including, but not limited to, diminution of the value of the Property, attorneys' fees, costs,
13 interest and other damages incurred to protect plaintiff's ownership and possessory interests in
14 the Property against the unlawful foreclosure activities of defendants, and each of them, in the
15 amount of \$180,000.00.

16 230. As a further proximate result of the wrongful conduct of defendants, and each of
17 them, as herein alleged, plaintiff have suffered severe humiliation, mental anguish, and emotional
18 and physical distress, and has been injured in mind and body in the sum of \$760,000.00.

19 231. As shown in the facts pleaded herein above, the acts of the defendants, and each
20 of them, were intended to cause injury to plaintiff, and each of them, or were despicable conduct
21 carried on by these defendants resulting in cruel and unjust hardship in conscious disregard of
22 plaintiff's rights, and were conducted with the intention to deprive plaintiff of property and
23 legal rights or otherwise cause injury, such as to constitute malice under California Civil Code
24 Section 3294. The fraudulent acts described herein above were done knowingly, willfully, and
25 with malicious intent, with a conscious disregard of the rights of plaintiff. It was conduct that
26 subjected plaintiff to cruel and unjust hardship, all of which entitle plaintiff, and each of
27
28

1 them, to punitive damages in the sum of \$850,000.00.

2
3 **TWENTIETH CLAIM FOR RELIEF**
4 **(Slander of Title as to Defendant Countrywide and Defendant MERS)**

5 232. Plaintiff incorporates by reference Paragraphs 1 through 231 as though fully set
6 forth herein.

7 233. In the February 2, 2006, Deed of Trust, defendant MERS was wrongfully named
8 as “nominee” and purported “beneficiary” by defendant lender Countrywide who retained legal
9 ownership and possession of the Promissory Note. It has long been held that the Deed of Trust
10 has no legal effect separate and apart and is subservient to the Promissory Note. As the
11 Promissory Note goes, so goes the Deed of Trust (no splitting is allowed by property law). By
12 attempting to legally and physically separate the documents, these defendants, and each of them,
13 have attempted to re-write property law to meet their financial needs and such attempt is wrongful
14 rendering the Deed of Trust Null and Void.

15 234. The filing of the Deed of Trust with the County Recorder’s office was wrongful
16 and without privilege.

17 235. By doing the acts described above, defendants slandered plaintiff’s title to the
18 Subject Property.

19 236. In that the conduct and acts of Defendants violated, among others, California Civil
20 Code section 2924(a)(1)(C), such conduct and acts were not privileged. . Plaintiff seeks a judicial
21 declaration from this court . it is necessary that this Court declare the actual rights and obligations
22 of the parties, according to fairness and justice, and make a determination as to the validity, nature
23 and extent that defendants separation of the Note and the Deed of Trust and procedures have no
24 legal effect against Plaintiff and instruments of the debt are null and void without legal effect.

25 237. As a further proximate result of the wrongful conduct of defendants, and each of
26 them, as herein alleged, plaintiff has been required to incur damages including, but not limited
27 to, diminution of the value of the Property, attorneys’ fees, costs, interest and other damages
28

1 incurred to protect plaintiff's ownership and possessory interests in the Property against the
2 unlawful foreclosure activities of defendants, and each of them, in the amount of \$180,000.00.

3 238. As a further proximate result of the wrongful conduct of defendants, and each of
4 them, as herein alleged, plaintiff has suffered severe humiliation, mental anguish, and emotional
5 and physical distress, and has been injured in mind and body in the sum of \$760,000.00.

6 239. As shown in the facts pleaded herein above, the acts of the defendants, and each
7 of them, were intended to cause injury to plaintiff or were despicable conduct
8 carried on by these defendants resulting in cruel and unjust hardship in conscious disregard of
9 plaintiff's rights, and were conducted with the intention to deprive plaintiff of property and
10 legal rights or otherwise cause injury, such as to constitute malice under California Civil Code
11 Section 3294. The fraudulent acts described herein above were done knowingly, willfully, and
12 with malicious intent, with a conscious disregard of the rights of plaintiff. It was conduct that
13 subjected plaintiff to cruel and unjust hardship, all of which entitle plaintiff to punitive
14 damages in the sum of \$850,000.00.

15 **TWENTY-FIRST CLAIM FOR RELIEF**
16 **[Declaratory Relief to Determine an Interest in Property]**
17 **[F.R.B.P. Sections 7001(1), 7001(2), 7001(7), and 7001(9)]**

18 240. Plaintiff incorporates by reference Paragraphs 1 through 239 as though fully set
19 forth herein.

20 241. Plaintiff alleges that he holds an interest in the Property free and clear of any
21 interest of defendants, and each of them, in that the lien, as evidenced by the Deed of Trust, is
22 null and void because no named defendant is a party in interest with standing to initiate
23 foreclosure proceedings. As such, all consequential acts in furtherance of a non-judicial
24 foreclosure sale must be declared null and void.

25 242. Plaintiff is informed and believe that defendants allege that the Deed of Trust
26 is fully enforceable and cannot be declared null and void, because its provisions allegedly
27 secure payment of the loan used to purchase the Property, and upon information and belief,
28

1 plaintiff alleges that defendants dispute the contentions alleged herein by the plaintiff.

2 243. An actual controversy exists between plaintiff and defendants with regard to the
3 validity, nature and extent of their interests in the Property.

4 244. It is necessary that this Court declare the actual rights and obligations of the
5 parties according to fairness, justice and law, and make a determination as to the validity,
6 nature and extent of defendants' interest in the Property.

7 245 . Tender requirement should not be applied in Plaintiff's case because Plaintiff alleges
8 fraud in the origination of the loan in his complaint, any tender requirement would be inequitable
9 for the Plaintiff. Additionally, Plaintiff is demanding \$1,790,000.00 in his complaint the potential
10 damages in this case exceeds the amount of the tender requirement. Plaintiff is now indigent mainly
11 because of the actions of Defendants it would be unjust to require Plaintiff to tender. Plaintiff
12 alleges under information and believe that Defendants have already factored in and adjusted for
13 losses and cost to defend future claims in the transaction by acquisition, merging, successor in
14 interest or assigning of Plaintiff's loan, and additionally by receiving government bailouts. To
15 require plaintiff to tender in order to defend his property would be unjust and inequitable
16 considering the fact that defendant banks are to blame for inflated property values which have
17 dropped 50% to 75% since it's peak. Plaintiff request that the Court declare that tender is not
18 required in Plaintiff's situation.

19
20 **TWENTY-SECOND CLAIM FOR RELIEF**
21 **(Violation of 12 USC 2607(a) Defendant Countrywide**
22 **Bank and Defendant American Mutual)**

23 246. Plaintiff Zarate incorporates by reference Paragraphs 1 through 245, as though
24 fully set forth herein.

25 247. 12 USC 2607(a) places a ban on parties from giving or receiving a
26 kickback or other thing of value incident to a federally related mortgage referral. It states:

27 No person shall give and no person shall accept any
28 fee, kickback, or thing of value pursuant to any
agreement or understanding, oral or otherwise, that

business incident to or a part of a real estate
settlement service involving a federally related
mortgage loan shall be referred to any person.(12 USC
2607(a))

248. The loan at issue herein is a federally related mortgage in that at the time the
loan was issued, defendant Countrywide Bank was a banking institution regulated by the
federal government.

249. Defendant Countrywide Bank separately paid a 'yield spread premium'
kickback fee of \$17,850.00 to American Mutual as a reward fee for 'steering' the plaintiff
into a more expensive loan, a loan with terms that more favored the lender's interests
rather than the borrower's interests. This payment and the receipt of this payment was in direct
violation 12 USC 2607(a).

250. In doing the act(s) as herein described, the defendants herein, and each of them,
are jointly and severally liable to the plaintiff Zarate for statutory damages pursuant to
12 USC 2607(d)(2) in an amount \$53,550.00.

251. As a further result of the breach of defendant American Mutual's breach of the
fiduciary duties owed to plaintiff Zarate, this plaintiff has incurred actual damages in the form
including, but not limited to, diminution in value of the Property, costs associated with the
foreclosure proceedings, and attorney's fees and other costs in the sum of \$180,000.00.

TWENTY-THIRD CLAIM FOR RELIEF

**[Quiet Title as to all Defendant and All Persons Unknown, Claiming
any Equitable Right, Title, Estate, Lien or Interest in the Property,
Described Herein, Adverse to Plaintiff's Title, or any Cloud on
Plaintiff's Title thereto, and DOES 1 through 20]**

252. Plaintiff incorporates by reference Paragraphs 1 through 251 as though fully set
forth herein.

253. Plaintiff is, and, at all times herein mentioned, was, the owners and/or entitled
to possession of the property located at 10826 Walmort Road, City of Wilton, County of
Sacramento, California, is more particularly described as:

1 All that certain real property situate in the
2 Unincorporated Area County of Sacramento, State of
California, described as follows:

3 All that portion of Tract No. 91, as described in the
4 partition of the Mokelumnes Rancho in the District
Court of the sixth Judicial District of the State of
5 California, in and for the County of Sacramento,
entitled "John F. McCauley, plaintiff, vs. Oved
6 Harvey, et al, defendants", described as follows:

7 The North 20.00 feet acres of the West 50.00 acres
8 of the East 80.00 acres of the Northeast one-quarter
of Section 14. Township 6 North, Range 6 East.
9 M.D.B. & M.

10 APN No. 134-0240-001-0000

11 254. Plaintiff Zarate obtained full ownership of the Property in fee when he
12 originally purchased the Property by way of grant deed and later refinanced as herein alleged .
13 Plaintiff's ownership interests are in fee and is superior to all other "interested parties" in the
14 Property with the exception of the owner, possessor, and holder of the Promissory Note
15 secured by the Deed of Trust. Plaintiff is informed and believes that said Promissory Note
16 no longer exists. And because Lender originally separated the instruments with the intention to
17 defraud plaintiff, the debt is declare Null and Void.

18 255. Plaintiff seeks to quiet title against the claims of
19 defendants, and each of them herein, and ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR
20 EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE
21 COMPLAINT ADVERSE TO PLAINTIFF'S TITLE, OR ANY CLOUD ON PLAINTIFF'S TITLE THERETO;
22 and DOES 1 through 20 (collectively referred to herein as the "Title Defendants") as the Title
23 Defendants hold themselves out in maintaining the authority and right to foreclose on the
24 Property offering fee simple ownership of the subject Property by and through the
25 foreclosure and purchase of the property at the trustee's sale. In fact, the Title Defendants
26 had no right to title or interest in the subject Property and no right to entertain any rights of
27 ownership including the right to foreclosure, offering the subject Property for sale at a
28

1 trustee's sale, and/or demanding possession or filing for unlawful detainer or filing a Proof of
2 Claim in Bankruptcy court . Nevertheless, illegally and with unclean hands, the Title
3 Defendants proceeded with initiating a non-judicial foreclosure sale by filing and serving the
4 Notice of Default.

5 256. On February 14, 2006, the closing date of the issuance of the refinance loan,
6 plaintiff Zarate executed the Deed of Trust which gave to the beneficiary the power of sale if the
7 monthly installment payments were not paid by him. This plaintiff executed the Promissory
8 Note and Deed of Trust as a result of fraudulent actions by the mortgage broker and lender,
9 defendant American Mutual and defendant Countrywide Bank, when American Mutual's
10 representative falsely and secretly inflated the plaintiff's income to qualify him for the
11 refinance loan, and then fraudulently stated to the plaintiff Zarate that he could afford the
12 loan and that his income qualified him for the loan. Plaintiff is informed and believe that,
13 later, defendant MERS, as the purported 'nominee' beneficiary caused the substituted trustee,
14 defendant ReconTrust, to initiate foreclosure on the Property without right or authority of the
15 owner or possessor of the Promissory Note.

16 257. Additionally, Plaintiff is informed and believes that at no time relevant to this
17 complaint were defendant MERS or defendant Mellon parties in interest with standing to
18 initiate and conduct foreclosure proceeding against the Property herein.

19 258. Plaintiff seeks to quiet title as of February 14, 2006, and seeks
20 a judicial declaration from this court according to fairness justice, that the title to the
21 subject Property is vested in plaintiff alone and that defendants Mellon and MERS, and the Title
22 Defendants, and each of them be declared to have no interest estate, right, title or interest in the
23 subject property and that the these defendants, their agents and assigns, be forever enjoined from
24 asserting any estate, right title or interest in the subject Property subject to plaintiff's rights.

25
26 259 . Tender requirement should not be applied in Plaintiff's case because Plaintiff alleges
27 fraud in the origination of the loan in his complaint, any tender requirement would be inequitable
28

1 for the Plaintiff. Additionally, Plaintiff is demanding \$1,790,000.00 in his complaint the potential
2 damages in this case exceeds the amount of the tender requirement. Plaintiff is now indigent mainly
3 because of the actions of Defendants it would be unjust to require Plaintiff to tender. Plaintiff
4 alleges under information and believe that Defendants have already factored in and adjusted for
5 losses and cost to defend future claims in the transaction by acquisition, merging, successor in
6 interest or assigning of Plaintiff's loan, and additionally by receiving government bailouts. To
7 require plaintiff to tender in order to defend his property would be unjust and inequitable
8 considering the fact that defendant banks are to blame for inflated property values which have
9 dropped 50% to 75% since it's peak. Plaintiff request that the Court declare that tender is not
10 required in Plaintiff's situation.

11
12 **WHEREFORE, plaintiff prays judgment as follows:**

- 13 1. That judgment be entered for plaintiff and against defendants, and each of them;
- 14 2. For Temporary Restraining Order, Preliminary Injunction, and Permanent
15 Injunction preventing defendants, or anyone acting in concert with them, from
16 (i) conducting a foreclosure sale during the pendency of this action (ii)
17 attempting to encumber, selling or otherwise transferring title, possession, or
18 ownership of the Property or (3) encumbering, selling, or otherwise
19 transferring title, possession, or ownership of the Property whatsoever;
- 20 3. For an Order from the Court declaring that the Deed of Trust, Notice of Default, and
21 Notice of Trustee's Sale, are declared null and void;
- 22 4. For statutory damages in the sum of \$53,550.00; (not counted ask lar)
- 23 5. For compensatory damages in the sum of \$180,000.00;
- 24 6. For consequential damages, according to proof at trial;
- 25 7. For general damages for all injuries resulting from the fraud, breaches of
26 fiduciary duties, and conspiracy, in the sum of \$760,000.00;
- 27 8. For punitive and/or exemplary damages against defendants in an amount
28

sufficient to punish defendants and each of them, as a result of their unlawful acts and practices in the sum of \$850,000.00;

9. For disgorgement and restitution for all earnings, profits, compensation, and benefit received by defendants, and each of them, as a result of their unlawful acts and practices;
10. For an order compelling said defendants, and each of them, to transfer legal title and possession of the subject property to plaintiff herein;
11. For a declaration and order determinating that title be quieted in plaintiff, and each of them, as the rightful owners in fee of the property and that all persons and all defendants herein, and each of them, be declared to have no estate, right, title or interest in said property;
12. For a judgment forever enjoining said defendants, and each of them, from claiming any estate, right, title or interest in the subject property;
13. For pre-judgment interest;
14. For costs and disbursements of the action; and
15. For such other and further relief as the Court mad deem just and proper.

Dated: June 22, 2012.

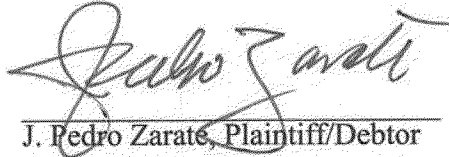
/s/Anh V. Nguyen
Anh V. Nguyen
Attorney for Plaintiff/Debtor
J. Pedro Zarate

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3 **VERIFICATION**

4 I, J. Pedro Zarate, am the plaintiff in the above-entitled action. I have read the foregoing
5 complaint and know its contents. The same is true of my own knowledge, except as to those matters
6 that are alleged in the complaint on information and belief, and as to those matters, I believe them
7 to be true.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct.

10 Dated: June 22, 2012.

11 
12 J. Pedro Zarate, Plaintiff/Debtor